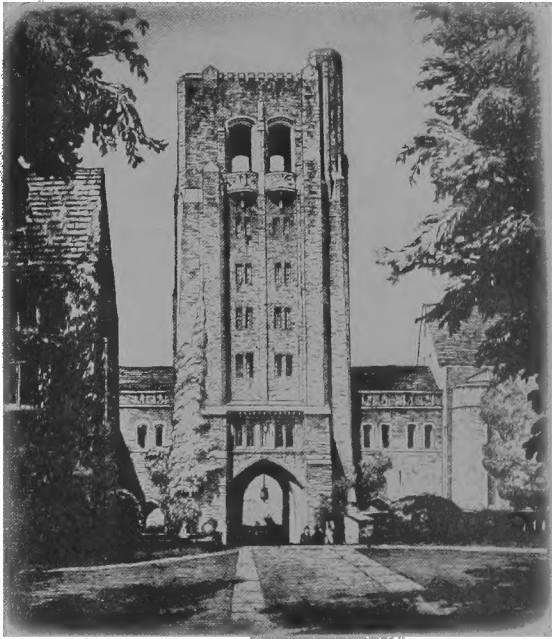


KF

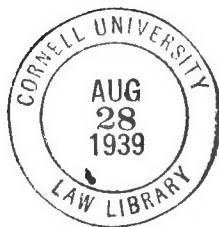
801

A73

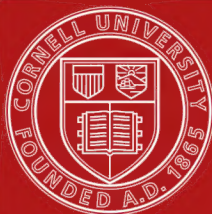
1881



Cornell Law School Library



R. H. W. W. W.



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A TREATISE
ON THE
LAW OF CONTRACT

CHARLES BY
F. W. CONSTREET
C. G. ADDISON
AUTHOR OF "THE LAW OF TORTS"

THIRD AMERICAN, FROM THE SEVENTH LONDON EDITION
OF LEWIS W. CAVE, Esq.

BY

JAMES APPLETON MORGAN

OF THE NEW YORK BAR. AUTHOR OF "THE LAW OF LITERATURE;" AMERICAN EDITOR
OF "DECOLYAR ON GUARANTY," &C. &C.

VOL. III

JERSEY CITY:
FRED. D. LINN & COMPANY,
PUBLISHERS.

1881,

B 48 182

Entered, according to act of Congress, in the year 1876.

By JAMES APPLETON MORGAN,

In the office of the Librarian of Congress, at Washington.



CONTENTS OF VOLUME III.

BOOK II.

CHAPTER IV.

CONTRACTS OF SECURITY.

SECT. 1.—*General principles.*

	PARAGRAPH	PAGE
The contract of mortgage	1017	1
The contract of pledge	1018	5
The contract of hypothecation.	1019	6

SECT. 2.—*Mortgage, etc., of realty.*

Mortgage of lands and tenements.	1020	8
Rights of the mortgagee when the mortgagor is in occupation of the mortgaged premises	1021	10
When the mortgagor becomes tenant to the mortgagee.	1022	12
When the mortgaged premises are in the possession and occupation of lessees.	1023	14
Leases by the mortgagor after the mortgage	1024	16
Notice of the mortgage to the lessee	1025	18
Equity of redemption of the mortgagor	1026	19
Rights of mortgagees	1027	23
Time within which the right of redemption may be exercised.	1028	26

	PARAGRAPH	PAGE
Accounts to be taken	1029	30
Registration of mortgages	1030	32
Re-conveyance of the estate	1031	33
Foreclosure and sale	1032	33
Enlargement of the time of payment	1033	35
Remedies of the mortgagee	1034	36
Powers of sale	1035	36
Tacking of arrears of interest and in- cumbances	1037	39
Priority of incumbrances and mort- gages	1037	39
Every priority may be lost by fraud	1039	42
After a decree to settle priorities	1040	73
Mortgage by deposit of title-deeds	1041	44
Authentication of the deposit as a charge on realty	1042	46
Parties entitled to make the deposit	1043	44
Extent of the lien	1044	48
Depositary's right to have the estate sold	1045	50
Liens on estates for unpaid purchase-money	1046	51
Priority of liens	1047	52
Rent-charges on lands and tenements	1048	54
Registration of rent-charges and annuities	1049	55
Power of distress, entry, and sale	1050	55
Extinguishment of rent-charges	1051	57
Registered judgments	1052	57
Warrants of attorney, <i>cognovits</i> , and orders for judgments	1053	58
Charges on lands by statute merchant, statute staple, and recognizance	1054	59
SECT. 3.— <i>Mortgage, etc., of chattels.</i>		
Mortgage of goods and chattels	1055	59
What things pass by the grant of goods and chattels	1056	62
Bills of sale of after-acquired property.	1057	63
Bills of sale by judgment debtors, and parties against whom execution has been issued	1058	66
Registration of bills of sale of chattels.	1059	66
Renewal of registration	1059	66

CONTENTS.

v

	PARAGRAPHS	PAGE
What is a bill of sale of chattels	1060	69
What is an "apparent possession" of personal chattels	1062	70
Requisites of the affidavit	1063	71
Description of the residence and oc- cupation of the grantor	1064	71
Description of the residence and occu- pation of the attesting witness	1065	72
Proof of the time of the making of the bill of sale	1066	73
Effect of registration	1067	74
Registration of assignments of bills of sale	1068	74
Registration of agreements for bills of sale	1069	75
Priority of holders of bills of sale	1070	75
Evasion of registration	1071	75
Mortgages void as against creditors	1072	75
Mortgages constituting an act of bank- ruptcy	1073	76
Mortgaged chattels left in the possession and apparent ownership of a bank- rupt mortgagor.	1074	78
Mortgage of machinery	1075	80
Pledges of goods and chattels	1076	81
Things which may be given in pledge	1077	81
Parties entitled to pledge	1078	81
Factors and agents intrusted with goods or documentary evi- dence of title to goods	1079	83
What are documents of title	1080	86
When documents of title may be said to be intrusted to a factor or agent	1081	87
What are advances and loans upon deposit within the Factor's Acts	1082	88
Implied warranty of title on the part of the pledgor	1083	89
The pledgor's right of redemption	1084	90
Sale of the pledgor's right of redemption	1085	1

	PARAGRAPH	PAGE
Forfeiture of the pledge	1086	91
Foreclosure of the right of redemption	1087	92
Accounts between pledgor and pledgee	1088	96
Custody and safe keeping of the pledge	1089	96
Use of things pledged	1090	97
Statutory rights and liabilities of pawn- brokers	1091	99
Who are to be deemed pawnbrokers	1092	99
Sale of things pledged	1093	99
Warranties on sales of unredeemed pledges	1094	100
Imperfect hypothecation of goods and chat- tels	1095	100
Licenses to distrain to secure payment of a debt	1095	100
Registration of licenses to seize and sell goods	1096	103
Revocation of the license by act of bankruptcy	1097	103
Mortgages of ships and of shares in vessels	1098	103
Maritime liens—Bottomry	1099	106
Of the power of hypothecation of the ship-master	1100	107
Lien on vessels causing damage	1101	110
Priority of maritime liens	1102	111
Hypothecation of cargoes and merchan- dise	1103	111
Illegal pledges	1104	113
Mortgages of fixtures	1105	113
Right to fixtures as between mortgagor and mortgagee	1106	113
Registration of bills of sale of fixtures	1107	114
SECT. 4.— <i>Mortgage, etc., of incorporeals.</i>		
Mortgages of shares and stock	1108	116
Mortgages of shares and stock void by reason of reputed ownership	1109	117
Lien upon shares and stock	1110	117

CHAPTER V.

CONTRACTS OF INDEMNITY.

SECT. 1.—*Principal and surety.*

	PARAGRAPH	PAGE
The contract of suretyship	1111	119
Authentication of guarantees.	1112	120
Primary and secondary liabilities	1113	122
Of the statement of the consideration on the face of a guarantee	1114	123
Proposals and offers to guarantee not amount- ing to a concluded contract	1115	124
Conditions precedent	1116	126
Bonds to secure faithful services	1117	126
Extent and duration of the liability of the surety	1118	128
Release of the surety	1119	129
Discharge of the surety by a change in the service or employment of the principal	1120	130
Bonds and guarantees under seal to part- nerships and associations	1121	131
Limitation of the liability of the surety	1122	132
Continuing liabilities	1123	133
Guarantees not importing a con- tinuing liability	1124	135
Conditions precedent to the liability of the surety	1125	136
Duty of the person guaranteed	1126	137
Alteration of the principal obligation discharging the surety	1127	138
Extension of the time of payment	1128	140
Proof of suretyship where the relation does not appear upon the face of the contract	1129	143
Effect of giving time to the principal debtor with reserve of remedies against the surety	1130	146

	PARAGRAPH	PAGE
Release of the principal debt discharging the surety	1131	148
Release of the principal obligation with reserve of remedies against the surety	1132	148
Release of one of several co-sureties	1133	151
Payment by the principal debtor operating as a discharge of the surety	1134	152
Fraud on sureties	1135	154
Death of the principal	1136	156
Death of the surety	1137	156
Indemnification of sureties	1138	156
Contribution between co-sureties	1139	158
Assignments of judgments and securities to the surety to enable him to obtain indemnification	1140	161
Breach of contracts of indemnity	1141	166
Bankruptcy of principal debtor	1141	166
Recovery of interest on money paid by sure- ties	1142	167
Guarantees by one of several partners in the name of the co-partnership	1143	167
SECT. 2.—<i>Marine Insurance.</i>		
Of contracts of insurance	1144	168
Mutual insurance	1145	169
Policies of insurance	1146	169
Voyage and time policies--Valued and open policies	1147	170
Insurable interest—Wagering and gaming policies of insurance	1148	173
Requisites of the contract	1149	176
Matters and things covered by the policy	1150	178
Implied warranties	1151	180
Express warranties	1152	184
Time of sailing	1153	185
Sailing with convoy	1154	186
Neutrality	1155	187
Fraudulent misrepresentation	1156	189
Fraudulent concealment	1157	201
Risks covered by the policy	1158	211
Deck cargoes	1159	212

	PARAGRAPH	PAGE
Intermediate voyages	1160	213
Loss by perils of the sea	1161	214
Negligence and misconduct of the master or mariners	1161	214
Losses from old age and decay and other causes, not being perils of the sea	1164	218
Perils of fire and jettison	1165	220
Loss by capture and seizure	1166	221
Restraints and detainerments of kings, princes, and people	1167	223
Peril of barratry of the master and crew	1168	225
Perils, losses, and misfortunes generally .	1169	227
Commencement of the risk	1170	228
Duration and the termination of the risk .	1171	231
Arrival at the port of destination—Moor- ing in safety	1172	233
Risks in landing the goods	1173	236
Insurance on profits	1174	238
Freight policies	1175	238
Loss of freight	1176	240
Insurance on passage money	1177	241
Deviation from the voyage insured	1178	241
Unreasonable delay.	1179	244
Insurances on voyages to several ports and places	1180	244
Licenses to touch at different ports and places	1181	245
Total loss and abandonment	1182	247
Notice of abandonment	1182	247
By whom notice of abandonment may be given	1183	249
Form of notice of abandonment . .	1184	249
Effect of notice of abandonment . .	1185	250
Insurance on freight	1186	250
When the insured may abandon	1187	252
Constructive losses	1188	255
Unreasonable abandonment	1189	257
Partial loss.	1190	258
General and particular average	1191	256

	PARAGRAPH	PAGE
Policies warranted free from average . . .	1191	259
Insurance on separate bales or packages . . .	1192	260
Average and total losses	1192	260
Exception of general average losses and stranding of the vessel	1193	263
Suing and laboring clause	1194	264
Valuation and adjustment of losses	1195	265
Calculation of the value	1195	265
Standard of value and measure of depre- ciation	1196	267
Liabilities of underwriters with reference to the amount of their subscrip- tions	1197	267
Signed adjustments	1198	270
Right of the insurer to recover compensation where the loss or damage has been caused by the negligence of a third party	1199	270
Non-inception of the risk	1200	271
Return of the premium	1200	272
Void policy	1201	273
Return of the premium	1201	273
SECT. 3.— <i>Fire Insurance.</i>		
Contracts of insurance against peril by fire.	1202	274
Parties entitled to the benefit of the insur- ance	1203	275
Things covered by the policy	1204	276
Warranties	1205	276
Alteration of premises increasing the risk	1206	277
Notice of alterations.	1207	279
Misdescription of the insured premises	1208	279
Fraudulent concealment of circumstances materially affecting the risk	1209	280
Risks covered by the policy.	1210	281
Fires caused by negligence	1211	283
• Notice of loss	1212	283
Forfeiture of the policy	1213	284
Non-payment of premium—Days of grace	1213	284
Divers insurances on the same property	1214	286
Insurances by warehousemen and bailees of the goods of their customers	1215	286

CONTENTS.

xi

	PARAGRAPH	PAGE
Inability of the insured to sue when he has sustained no damnification	1216	287
Right of insurer and insured as against wrong- doers causing the loss.	1217	287
Assignment of fire policies	1218	288
Laying out insurance money in re-building	1219	288
SECT. 4.— <i>Life Insurance.</i>		
Contracts of life insurance	1220	289
Contracts with de facto directors.	1221	289
Interest of the assured	1222	289
Warranties—Conditions	1223	292
Fraudulent misrepresentation and fraudulent concealment	1224	293
Principal and agent	1225	294
Indisputable policies	1226	295
Risks covered by the policies	1227	295
Forfeiture of policies	1228	296
Non-payment of premium—Days of grace	1228	296
Non-inception of the risk—Return of pre- mium	1229	297
Waiver of forfeiture	1230	298
Assignment of life policies	1231	298
Right of the party interested in the policy to recover the assurance money.	1232	301
Appropriation of the funds of life assurance companies	1233	301
Winding-up of insurance companies.	1234	302
Novations by policy holders	1235	303
Insurance against injury by accident	1236	303
Breach of contracts of insurance—Railway accidents	1237	304
Breach of covenants to insure	1238	305

CHAPTER VI.

MERCANTILE INSTRUMENTS.

SECT. 1.—*Bills, Notes, and Checks.*

Bills of exchange	1239	306
Transfer of bills of exchange	1240	307

	PARAGRAPH	PAGE
Restrictive endorsements	1241	310
Who is to be deemed a bona-fide holder by endorsement	1242	311
Intermediate infirmities of title	1243	313
When the holder is bound to prove that he gave value for the bill	1244	314
Fraudulent transfers and endorse- ments	1245	315
Accommodation bills	1246	316
Indorsement of bills overdue	1247	317
Presentment for acceptance	1248	318
proof of the acceptance	1249	319
Fictitious endorsee	1250	319
Liability of the acceptor—Failure of con- sideration	1251	320
Liability of the drawer and endorser	1252	321
Giving time for payment	1253	322
Presentment for payment	1254	323
Non-presentment, when excused	1255	325
Days of grace	1256	326
Notice of dishonor	1257	327
What amounts to notice of dishonor	1258	329
Posting the notice	1259	330
Foreign bill—Protest—Noting.	1260	331
Proof of notice of dishonor	1261	332
Dispensation of notice	1262	332
Transfer by delivery without endorsement	1263	335
Bills taken up <i>supra protest</i>	1264	335
Retiring of bills by acceptors and en- dorsers	1265	336
Payment and satisfaction	1266	336
Promissory notes	1267	336
Transfer of promissory notes	1268	339
Liability of the makers and en- dorsers	1269	340
Indorsement of notes overdue	1260	341
Notes payable at a particular place	1271	341
Days of grace	1272	341
Bills and notes for the payment of sums under £1	1273	341

CONTENTS.

xiii

	PARAGRAPH	PAGE
Dividend warrants	1274	342
Banker's cheques	1275	343
Presentment of cheques for payment	1276	343
Summary remedy for non-payment of bills, cheques, and notes	1277	344
Cancellation of bills and notes	1278	345
Proof of want of consideration	1279	345
Alterations in a bill or note avoiding the con- tract	1280	346
Immaterial alterations	1281	347
Loss of bills and notes	1282	350
Damages recoverable on the dishonor of bills.	1283	350
Damages for not meeting bills at matur- ity	1284	351
Parties to bills	1285	351
Trustees, agents, &c.	1286	352
Partners.	1287	353
Trustees or directors of co-partnerships	1288	356
Joint-Stock Companies.	1289	357
SECT. 2.— <i>Bills of Lading and Dock Warrants.</i>		
Bills of lading	1290	359
Assignment of bills of lading	1291	359
Dock warrants	1292	361

CHAPTER VII.

CONTRACTS OF ASSOCIATION.

SECT. I.—*Partnership.*

What constitutes a partnership	1293	362
Participation in profits	1294	363
Payment of interest out of profits	1295	365
Joint purchases of goods	1296	366
Tenancy in common of chattels	1297	367
Conditions precedent to the formation of a partnership	1298	367
Specific performance of a contract for a part- nership	1299	368

	PARAGRAPH	PAGE
Of a partnership in profits, but not in the capital stock	1300	369
Introduction of new partners	1301	370
Contracts between the firm and one of the partners	1302	370
Contracts between partners individually in their own names	1303	371
Distribution of the profits of co-partnership	1304	373
Action by one partner against another for a balance found to be due on a settlement of accounts	1305	374
Action for a share of the profit of a particular joint adventure	1306	374
Contributions between parties to the common loss	1307	375
Particular transactions not connected with the general account of profit and loss	1308	376
Purchases by one partner on behalf of the firm	1309	377
Fraudulent use of the co-partnership name	1310	377
Contracts for partnership induced by fraud	1311	377
Dissolution of partnership	1312	377
Distribution of the partnership property and effects	1313	380
Use of the name of the firm after dissolution	1314	381
SECT. 2.— <i>Joint-Stock Companies.</i>		
Joint-stock companies	1315	381
General duties of directors	1316	382
Liabilities of directors	1317	386
Amalgamation of companies	1318	389
Injunction to restrain unauthorized contracts	1319	391
The dissolution and winding up of registered joint-stock companies	1320	393
Parties liable to be made contributories	1321	397
Calls on contributories constituting specialty debts.	1322	412
Fraudulent representations by directors inducing parties to become shareholders	1323	412
Limitation of the liability of contributories	1325	415

CONTENTS.

XV

	PARAGRAPH	PAGE
Release of the liability to contribute by a transfer of the shares	1326	416
Release from liability to contribute by reason of a forfeiture of shares	1327	420
Extent and duration of the liability of outgoing and incoming share- holders	1328	420
Liabilities of husbands, real and personal representatives, devisees, and as- signees, as contributories.	1329	421
Railway companies	1330	424
Contracts ultra vires	1330	424
Powers of the directors	1331	424
Applications to parliament for an exten- sion of the powers of the com- pany.	1332	425
Void contracts by chairmen of railway companies	1333	426
Money borrowed by directors on railway debentures	1334	426
Bonds and loan notes by directors	1335	427
Contracts in which a director is person- ally interested	1336	428
Indemnification of directors	1337	429
Committees of management of projected undertakings	1338	430
Contracts for the payment of the pro- jector out of the deposits	1339	431
Contribution between joint managers, directors, and provisional com- mitteemen	1340	432
Of the rendering of accounts and of the appropriation of the funds	1341	433
Contracts between a committee of man- agement and the subscribers and shareholders	1342	433
Allotment of shares	1343	43
Payment of subscriptions and deposits.	1344	435
Recovery of deposits on the abandonment of the undertaking	1345	435

	PARAGRAPH	PAGE
Misrepresentation of committeemen and managers	1346	436
Dissolution of inchoate railway and parliamentary works companies—Contributories	1347	437
SECT. 3.— <i>Marriage.</i>		
Contracts in restraint of marriage	1348	440
Marriage brokerage contracts	1349	441
Bonds and unilateral covenants to marry	1350	443
Contracts of betrothment	1351	446
Authentication of the contract	1352	447
Time of performance	1353	447
Excuses for non-performance	1354	448
Conditional promises of marriage	1355	449
Fraudulent concealment of material circumstances	1356	449
Transfer of property by the lady after the promise	1357	450
Accidents and mishaps altering the condition of either of the parties	1358	451
Abandonment of the contract	1359	451
Breach of promise of marriage	1360	451
Promises of portions and settlements	1361	452
Fraudulent representations of relations to bring about a marriage	1362	452
Ante-nuptial settlements by women engaged to be married	1363	455
Ante-nuptial settlements by intended husband and wife	1364	456
Marriage settlements by infants	1365	458
Settlements of after-acquired property.	1366	459
Post-nuptial settlements	1367	460
Post-nuptial settlements in fulfillment of an ante-nuptial contract in writing	1368	462
. Of the wife's right to a post-nuptial settlement	1369	463
Contracts in fraud of settlements and promises of marriage portions.	1370	463
Effect of adultery on marriage settlements	1371	466

CONTENTS.

xvii

	PARAGRAPH	PAGE
Costs of marriage settlements	1372	466
The marriage contract, its nature and re-		
quisites	1373	466
Of the age of consent	1374	467
Presumption of marriage	1375	467
Void marriages	1376	468
Publication of banns and celebration of		
marriage in a false name	1377	469
Marriage by license in a false name	1378	470
Fraudulent celebration of a sham marri-		
age	1379	471
Of the husband's rights to the rents and profits		
of the wife's lands	1380	471
Gifts from the husband to the wife	1381	477
Liability of the husband of a <i>feme covert</i>		
executrix	1382	477
Release by marriage	1383	478
Deeds of separation	1384	479
Subsequent reconciliation	1385	480
Wife's right of action after separation	1386	481
Effect of a decree for a divorce	1387	482
Effect of a decree for a judicial separation	1388	482
Dissolution of the coverture by death	1389	482
The husband's rights by survivorship	1389	482
Recovery by the surviving husband of		
money and property belonging		
to his deceased wife	1390	484
Liabilities of the surviving husband	1392	483
The wife's rights by survivorship	1393	486
Unrecovered <i>choses in action</i>	1394	488
Gifts to the wife during marriage	1395	489
<i>Paraphernalia.</i>	1396	489
Liabilities of the surviving wife	1397	490
When the wife is entitled to an indemnity		
out of the estate of her deceased		
husband	1398	490

CHAPTER VIII.

IMPLIED CONTRACTS.

SECT. I.—*General Principles.*

	PARAGRAPH	PAGE
Implied contracts	1399	491
Implied covenants	1400	492
Implied promises	1401	495
Part execution of a special contract	1402	500
Implied contracts of sale	1403	500
Foreign judgments	1404	501

SECT. 2.—*Implied Promises in respect of Money paid for another.*

Implied promises in respect of money paid for another.	1405	602
Money paid by mistake	1406	504
Implied request to pay	1497	504

SECT. 3.—*Implied Promises in respect of Money received for the Use of another.*

Implied promises in respect of money received for the use of another	1408	509
Money paid by mistake	1406	513
Money improperly received and wrong- fully detained	1410	513
Money received upon a consideration that has failed	1411	517
Money received under an illegal contract	1412	519
Money received by agents	1413	521
Receipt of foreign money	1414	523

SECT. 4.—*Implied Promises in respect of Account stated.*

Implied promise in respect of an account stated	1415	523
Account stated with trustees	1416	526
Settlement of mutual accounts	1417	527
Mistakes in accounts	1418	528

THE LAW OF CONTRACT

CHAPTER IV.

CONTRACTS OF SECURITY

SECTION I.

GENERAL PRINCIPLES.

1017. *The contract of mortgage*, founded upon our common law doctrine of conditions, is a contract whereby a debtor grants or conveys an estate or interest in land, or transfers goods and chattels to his creditor subject to a proviso that, if the debt is discharged by a day named, the grant or transfer shall be void, and the debtor shall be again entitled to his lands or his goods, and shall hold them as if the grant or transfer had never been made.¹ The debtor who

¹ The form of a pledge has probably always been familiar to every nation, and among the Chinese particularly, a people not apt to borrow customs from other nations, pawn shops are a long established institution. The mortgage is a device of greatest antiquity—perhaps more ancient than any other form of instrument now in use. It is alluded to by Nehemiah as in use amid the poverty and distress prevailing among the Jews who had returned from the captivity. See

makes the grant or transfer is called the mortgagor and the creditor to whom it is made, the mortgagee. By a contract of this description the right of prop-

Nehemiah v. 1, 2, 3, 4, 5, 6, 7: "And there was a great cry of the people and of their wives, against their brethren the Jews. For there were that said, We, our sons and our daughters are many: therefore we take up corn for them, that we may eat and live. Some also there were that said, We have mortgaged our lands, vineyards, and houses, that we might buy corn, because of the dearth. There were also that said, We have borrowed money for the King's tribute—and that upon our lands and vineyards Then I consulted with myself and I rebuked the nobles and the rulers, and said unto them, Ye exact usury every one of his brother—and I set a great assembly against them." It seems, by the Jewish law laid down in Deuteronomy, that the Jews were not allowed to take interest from each other—but only of Gentiles: "Thou shalt not lend upon usury to thy brother, usury of money, usury of victuals, usury of anything that is lent upon usury: unto a stranger thou mayest lend upon usury: but unto thy brother thou shalt not lend upon usury: that the Lord thy God may bless thee in all that thou settest thine hand to in the land whither thou goest to possess it." Deut. xxiii. 19, 20. (It is to be remembered that—until the 37th of Henry VIII. cap. 9, declaring loans at 10 per cent. legal—the word usury must be understood to mean usance, or interest.) From the Jews the custom reached the Greeks and Romans. In Athens, if the land-proprietor borrowed any money on his lands, he was obliged to put up an inscription declaring the extent of the mortgage; and, it seems, that in Attica there were no entailed estates to prevent the payment of debts to incautious creditors. Camp. Lec. Poet. And the Roman *hypotheca*, of the civil law, corresponded very closely with the description of a mortgage in our law, the land being, under the *hypotheca*, retained by the debtor, and the creditor being entitled to his *actio hypothecaria* to obtain possession of the pledge when the debtor was in default, the debtor having his action to regain possession when the debt was paid or satisfied out of the profits, and he might redeem at any time before a sale. 4 Kent Com. 136; Chapman v. Turner, 1 Cal. 252. "Si fundum parentes tui ea lage vendiderunt, ut sive ipsi, sive haeredes eorum emptori pretruin quandocouque, vel intra certa tempora obtulessent, reslituereratur; teque pora satisfacara conditioni dictae, haeras emptori non paret, ut con-

erty in the thing mortgaged passes to the creditor, subject to be divested by the payment of the debt at the appointed time. (a)¹

(a) Ryall v. Rowles, 1 Ves. senr. 358.

tracteo fides servetur actio praescriptis vertis, vel ex vendito tibi dabita; habetur ratione eorum, quæ post oblatam ex pacto quantitatem ex eo fundo adversarium per venerunt." (So in the French Code, the hypothèque of land, which employs the conveying words, obligé, engagé, aliéné, affecté, et hypothéqué, is equivalent to a mortgage under the laws of Missouri, and is embraced in the provisions of the territorial act of October 20, 1807, concerning mortgages. *McNair v. Lott*, 25 Miss. 82.) The custom of mortgaging was retained by the Jews, who were the money-lenders of the Middle Ages. It is said that there were no mortgages of land in England while the feudal tenures existed. *Trea. Eq. lib. 3, c. 1, s. 1.* Although it might have been a rule in the feudal law, that *feudalio invito domino, aut agnatio, non recte subjiciuntur hypothecæ*; yet it appears from *Craig* that, with the concurrence of the lord, the tenant might have aliened, and consequently have mortgaged his lands. *Feud. lib. 2, tit. 5, s. 5.* In the reign of Henry I., mortgages of freehold and inheritance and of terms for years are described by *Glanville* as existing. They appear to have been adopted from the customary law of Normandy. *Grand. Cust. lib. 10, c. 8, s. 20.* *Vin. Inst. lib. 3, tit. 15.* And a feudal lord could always mortgage his lands, as *William, Earl of Poitiers*, mortgaged his provinces of *Guinne* and *Poictou* to *William Rufus*, King of England. 1 *Hume, Hist. Eng. 270; Ib. 80.* In the twentieth year of *William's* reign, and on the completion of the domesday book, that king had assembled all the landholders and accepted

¹ 4 Kent Com. 133; and see *Richards v. Chace*, 2 Gray, 385: "A mortgage is a conditional conveyance of land, designed as a security for the payment of money, the fulfillment of some contract, or the performance of some act, and to be void upon such payment, fulfillment or performance. To constitute a mortgage, it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage. Per APPLETON, J., in *Mitchell v. Burnham*, 44 Me. 286. *Smith v. People's Bank*, 24 Id. 185. See *post*, note on the Equity of Redemption.

In ancient times, lands yielding fruits and profits, and living animals and chattels bearing increase, were conveyed and transferred by debtors to their creditors upon trust to apply the proceeds and profit thereof in liquidation of the debt, and, as soon as the debt was extinguished, to render them back again. This description of pledge was denominated *vivum vadium*, or a live or living pledge, because it was constantly fructifying and paying off the debt, and working its own redemption. When, on the other hand, the things transferred to the creditor, to be held as security for the due payment of the debt, yielded no profits and bore no fruits of increase, or the proceeds and profits thereof were not to be applied in liquidation of the debt, but the things themselves were to be absolutely forfeited and to become the property of the creditor in case of the non-payment of the debt at the appointed time, it was called *mortuum vadium*, or dead pledge, and hence the derivation of our modern term "mortgage." (b)¹

(b) Beam's Glanville, 252.

from them a surrender of their lands, which he re-granted them on performance of homage and an oath of fealty. The mesne lords, on their subinfeudations, also demanded homage and fealty, this bond of allegiance being held mutual—each being bound to defend the other—whence flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seignory without his tenant's consent, although his tenants, even of the crown, might grant subinfeudations (i. e., to hold of themselves) without licence. Further, it was held that a tenant could not subject his land to his debts by execution of law, for that he might not effect that circuitously which he could not directly. Nor, if the lands came by descent, could he alien them without the consent of the next collateral heir, under which restraints mortgages must have been very rare.

¹ A Welsh mortgage was one whereunder the mortgagee entered into possession taking rents and profits by way of in-

1018. *The contract of pledge* is a bailment or delivery of goods and chattels by one man to another, to be held as a security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged, or the engagement has been fulfilled. The thing deposited as a security is called a pawn or pledge; the party making the deposit, the pawnor or pledgor; and the person who receives it into his possession, the pawnee or pledgee. The contract is to be distinguished from the contract of hypothecation by the transfer of the possession, or the actual tradition or delivery of the thing intended to be charged, to the creditor, (c) and from the contract of mortgage by the absence of a transfer of the ownership or right of property thereof to the pawnee during the continuance of the trust. A written memorandum of deposit or pledge, therefore, does not require a mortgage stamp; but it will, in general, require an agreement stamp. (d)

(c) *Proprie pignus disimus quod ad creditorem transit, hypothecam cum non transit possessio ad creditorem.* Dig. lib. 13, tit. 7, lex 9, § 2, lex 35, § 1.

(d) *Harris v. Birch*, 9 M. & W. 594.

terest upon the debt until the mortgagor paid the principal; but these long since fell into disuetude. It carried a right to redeem, but not to foreclose. See *Fisher on Mortgages*, 7. A "Bristol Bargain" was a bargain for the repayment of debt and interest by installments at the rate of £20 per annum for 7 years for every £100 advanced, up to which point it was allowed, the legal rate of interest being then 6 per cent. But when it was attempted to increase the number of annual installments to eight, it was declared that the agreement was against conscience, and redemption was decreed on the usual term of paying principal and interest, and it was said by *TREVOR, M. R.*, that he thought the court would relieve against an ordinary "Bristol Bargain," by the repayment by installments for seven years. *Fullthorpe v. Foster*, 1 Vern. 477.

If the thing intended to be burdened with the debt or charge remains in the possession, order, and disposition of the owner, there is no pledge. By a pledge, therefore, of goods and chattels the right of possession is altered, but not the right of property. The pawnee, during the continuance of the contract, is the lawful possessor, and has a special property in the chattel as a bailee; but the general right of property and ownership still continue in the pawnor. (e)

The distinction between the contract of pledge and the contract of hypothecation, in the Roman law, is thus marked in the Institutes: "By the term pledge is meant that which has actually been delivered to a creditor, especially if the thing was a movable; and by the word hypothecation we comprehend what is obliged to a creditor by a mere agreement without any delivery." (f) The contract of pledge, like the contract of hypothecation, is accessorial to a principal debt or obligation, or the debt or obligation of a third party. It is in all cases a security for every part of the debt or engagement, so that if a portion is discharged, the pledge remains as a security for the residue. (g)

1019. *The contract of hypothecation*, as it existed amongst the Greeks and Romans, was a contract whereby a debtor charged certain specific property or all his property generally with the payment of a certain debt. It derived its name from the Greek word *ὑποθήκη*, from *ὑπό* and *τίθεσθαι*, to place under an obligation, the property being subjected to a specific charge. No right of property in the thing hypothecated was, by this contract, transferred to the creditor nor any right to the possession thereof; but the debt

(e) *Ratcliff v. Davies*, Cro. Jac. 244.
Ryall v. Rolle, 1 Atk. 167. Bac. Abr.
 BAILMENT, B.

(f) *Inst. lib. 4, tit. 6, § 7.*

(g) *Pothier, Nant. Nos 43, 46. Do-*
mat, liv. 3, tit. 1, § 1.

was tacked on to the property, so that the creditor had a right to follow it through whatever hands it might happen to pass, and attach it, and sell it in satisfaction and discharge of the debt. A contract or power of this kind which enabled one man to have the visible ownership, and another a secret power of disposal of property, was liable to great abuse, and afforded a great temptation to fraud ; and this was sought to be guarded against by making the contract public and notorious, so that all persons dealing with hypothecated property might be put upon their guard, and be furnished with the means of ascertaining the nature and extent of the charges upon it. (*h*). Hypothecation by the French law is either legal, judicial, or conventional. Under the term "legal hypothecation" are comprehended all such charges and liens upon property as arise by implication and intendment of law. By a judicial hypothecation is meant that description of charge or claim upon property which results from the judgments of the courts of justice and from judicial acts ; and a conventional hypothecation is that which is founded purely upon contract. This last description of hypothecation "can only be consented to by an act passed in authentic form before two notaries, or before one notary and two witnesses." (*i*)

(*h*) Sir Wm. Jones, *Com. Isæus*.

(*i*) *Cod. Civ. liv. 3, tit. 18, 2127*

SECTION II.

MORTGAGE, ETC., OF REALTY.

1020. *Mortgage of lands and tenements.*—The owner of an estate or interest in land, who grants or conveys away his interest, may annex whatever condition he pleases to the grant, upon the principle that *cujus est dare ejus est disponere* ; and, therefore, if he wants to raise money and give security for its repayment, he may grant his estate to the lender, annexing to such grant a condition that, if he repays the sum advanced by a day certain, the grant shall be void, and he shall be entitled to re-enter and re-possess the land. When lands or tenements are granted to be holden by the grantee and his heirs and assigns for ever, subject to such a condition, the grant is a mortgage in fee. When they are granted to be holden for a term of years it is a mortgage for a term of years. In either case the estate granted is a defeasible estate. If the act to be done is performed at the appointed period, the grant or demise is at an end, and the grantor is seized or possessed of his old estate ; if it is not performed, the grantee holds the estate discharged of the condition, and becomes the legal owner of the estate in the property, in accordance with the strict terms of stipulations of the contract. In the first case, the estate is re-vested in the mortgagor by the mere performance of the condition. In the latter, it can not be re-vested in him without a fresh conveyance from the mortgagee. If by the terms of the contract the mortgagor is to remain in possession of the property and receive the rents and profits thereof until the day

of payment, or for any determined period, he becomes tenant to the mortgagee, and there is a demise of the premises for the intervening period. (*j*)¹ If, on the other hand, there is no term or stipulation in the contract clothing the mortgagor with the right of possession until the time of payment has arrived, the mortgagee has the right of possession as well as the right of property the instant the mortgage is executed, and may, when the mortgagor is himself the occupier of the mortgaged property, enter upon and take possession of the mortgaged premises, or enforce such right through the medium of an action. (*k*)²

If the mortgaged money is tendered at any period of the day appointed for the payment of it, the condition is saved for ever, the grant is void, and the mortgagor has a right to re-enter and hold the land of his former estate. (*l*)³ If a lease is assigned by way of mortgage, the mortgagee will be liable, as the assignee of the term, to all covenants in the original lease running with the land, although he never entered or took

(*j*) *Wilkinson v. Hall*, 3 Bing. N. C. 508; 4 Sc. 301. *Doe v. Goldwin*, 2 Q. B. 143. *Partridge v. Bere*, 1 D. & R. 272; 5 B. & Ald. 604.

(*k*) *Rogers v. Grazebrook*, 8 Q. B. 895. *Doe v. Lightfoot*, 8 M. & W.

553. *Doe v. Maisey*, 8 B. & C. 767. *Doe v. Giles*, 2 Moo. & P. 749. *Doe v. Day*, 2 Q. B. 147.

(*l*) *Bac. Abr. MORTGAGE* 537; *CONDITION*, 141, 144-146. *Co. Litt.*, 218, 219.

¹ See per *COWAN, J.*, in *Cameron v. Irwin*, 5 Hill, 280.

² *Furbish v. Goodwin*, 9 Fost. 321; *Lackey v. Holbrook*, 11 Met. 460; *Brown v. Leach*, 35 Me. 39; *Brown v. Stewart*, 1 Md. Ch. 87; *Wales v. Mellen*, 1 Gray, 512; *Allen v. Parker*, 27 Me. 531; *Taylor v. Wild*, 5 Mass. 120; *Miner v. Stevens*, 1 Cush. 485; *Smith v. Taylor*, 9 Ala. 663; *Mauloney v. United States, &c.*, 4 Ala. N. S. 745; *Harmon v. Short*, 8 Sm. & Mar. 433; *McIntyre v. Whitfield*, 13 Id. 88; *Hobart v. Sanborn*, 13 N. H. 226; *Walcopp v. McKinney*, 10 Miss. 229; *Pickard v. Low*, 3 Shepl. 48; *Coles v. Clark*, 3 Cush. 399.

³ See *Neligh v. Michenor*, 3 Stockt. 539.

actual possession of the estate. (*m*) The existence of the mortgage does not deprive the mortgagee of his remedies as a creditor against the mortgagor personally for the recovery of the debt secured by the mortgage. If, therefore, the mortgage-deed contains no covenant for the repayment of the money advanced, an action for money lent will lie. (*n*) The delivery up of the mortgage-deed will not of itself cancel the mortgage debt. (*o*)¹

1021. *Rights of the mortgagee when the mortgagor is in occupation of the mortgaged premises.*—The courts will not infer, from the mere insertion in the mortgage-deed of a covenant on the part of the mortgagor that it shall be lawful for the mortgagee, after default made in payment of the debt at the time

(*m*) *William v. Bosanquet*, 1 B. & B. 238. But see *Painter v. Abel*, 9 Jur. N. S. 949, 950.

(*n*) *Yates v. Aston*, 4 Q. B. 182. (*o*) *Hurst v. Beach*, 5 Mad. 351.
Mathew v. Blackmore, 1 H. & N. 762.

¹ At common law a distinction was made between a mortgage made to secure a sum of money as a mere gift, and one made to secure a previous debt; in the former case a tender within the time discharged the estate and gave the mortgagor a right of entry, and the mortgagee having no further lien upon the land, nor any personal right of action, was left without remedy for his money. But in the latter case, though such tender discharged the land, yet the debt remained, and might be recovered by action; for it was a duty distinct from the condition, and therefore not lost by the lender and refusal. *Hilliard on Mortgages*, ii. 20. And see *Swett v. Horn*, 1 N. H. 332; *Darling v. Chapman*, 14 Mass. 104; *Hill v. Robertson*, 24 Miss. 368; *Merritt v. Lambert*, 7 Paige, 344; *King v. Slate*, 7 Cush. 7; *Blanchard v. Kenton*, 4 Bibb. 451. If a place be mentioned it must be duly observed. *Hilliard on Mortgages*, i. 23. Upon the ground that a suit to foreclose a mortgage is to be regarded as a suit for money due thereupon, it was held in *Powers v. Powers*, 11 Vt. 262, that a tender, as in all other cases of indebtedness, was a good defense.

appointed, or after giving "one month's notice," to enter upon the mortgaged lands, any covenant on the part of the mortgagee that it shall be lawful for the mortgagor to retain possession until default made; and such a covenant does not, consequently, prevent the mortgagee from entering immediately after the execution of the mortgage; (*p*) but, if, from the mutual covenants of the parties and the general context of the deed, it appears to have been plainly intended that the mortgagor shall have possession until default, the courts will give effect to such intention. (*q*) Whenever the mortgagor is merely permitted to occupy the mortgaged premises, or to receive the rents and profits thereof, without being expressly clothed with the right of possession, he possesses the premises at sufferance in the strictest sense; and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop he has sown. So far as regards the possession of the land, he is not even tenant at will to the mortgagee; but he receives the profits of the land for his own use, and not as an agent or bailiff of the mortgagee; and, when he has once received them, he is entitled to keep them as his own. If, by the mortgage-deed, power is given to the mortgagee to enter upon the premises and distrain for interest in arrear in like manner as for rent reserved on a lease, the exercise of the power is no recognition of the mortgagor as tenant or lessee, and does not preclude the mortgagee from bringing an action of ejectment without demand of possession or notice to quit. (*r*) A power of distress of this sort, being a mere personal license

(*p*) *Doe v. Lightfoot*, 8 M. & W. 564.
Doe v. Day, 2 Q. B. 147. *Rogers v.*
Grazebrook, 8 Q. B. 895.

(*q*) *Wheeler v. Montefiore*, 2 Q. B. 142.

(*r*) *Doe v. Goodier*, 16 L. J., Q. B. 435.

to enter and distrain, is not assignable over. (s) But if a tenancy is created, the power is annexed to the tenancy, and goes with the reversion. (t) ¹

1022. *When the mortgagor becomes tenant to the mortgagee.*—If the mortgage-deed contains a clause whereby the mortgagor attorns and becomes tenant to the mortgagee at a specified annual rent payable half-yearly so long as the mortgage-money remains secured upon the mortgaged premises, and the mortgagor continues in the occupation of the mortgaged premises and pays rent, the subsequent occupation taken in connection with the clause of attornment constitutes the relation of landlord and tenant between the parties, and the mortgagee may distrain for the rent, although he never himself executed the mortgage-deed. (u) ² When the mortgage-deed contains a clause of this description, a right of entry should be reserved in default of payment of the rent, so as to enable the mortgagee, in case the rent remains unpaid, to enter upon the lands or bring an action of ejectment, without giving a notice to quit. (x) If by

(s) *Brown v. Metropolitan Counties Life Assurance Company*, 28 L. J., Q. B. 236.

(t) *Jolly v. Arbuthnot*, 28 L. J., Ch. 547.

(u) *West v. Fritche*, 3 Exch. 216.

Morton v. Woods, L. R., 3 Q. B. 658. *Ib.*, 4 Q. B. 302; 37 L. J., Q. B. 242; 38 *Ib.* 81.

(x) *Doe v. Tom*, 4 Q. B. 615. *Metropolitan Counties Assurance Co. v. Brown*, 4 H. & N. 434; 28 L. J. Ex. 340.

¹ "Whether mere notice to tenants by a mortgagee to pay rent to him, or any other act short of an actual or constructive entry, will defeat the right of the mortgagor to take the rents and profits to his own use, may be a question." *Field v. Swan*, 10 Met. 114. And see *Smith v. Shepard*, 15 Pick. 147. And a mortgagor may recover the rents from one who has received them wrongfully, the mortgagee having made no claim to them, although the law-day be past *Branch Bank, &c., v. Fry*, 23 Ala. 770. See *Watts v. Coffin*, 11 Johns. 495; *McKircher v. Hawley*, 16 Johns. 292.

² See cases cited in note 1, p. 14.

the terms of the mortgage-deed the mortgagor is to hold possession for any certain or determined period, there will then be a demise to him of the mortgaged estate for the term specified. If he is to hold until the happening of some uncertain event, he will have a conditional estate, and will be tenant to the mortgagee until the event has happened. If the mortgage-deed contains a clause of attornment, or creates a tenancy as between the mortgagor and mortgagee, but does not create any definite or certain term of holding, the mortgagor will be tenant at will. The reservation of a yearly rent is not inconsistent with a tenancy at will. Therefore, a clause in a mortgage-deed that the mortgagor shall become tenant to the mortgagee at a yearly rent does not necessarily create a yearly tenancy. (y) If by the mortgage-deed it is covenanted or agreed that the mortgagor shall hold as tenant at will to the mortgagee at an annual rent recoverable by distress, and the mortgagor demises the premises to a third party, the tenancy at will is not determined, and the mortgagee is not deprived of his right to distrain. (z) Where it was provided that, in case of default in payment, the mortgagor shall hold the premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease, and the mortgagor, having made default, the mortgagees, after the lapse of more than a year from the default, distrained as for a year's rent in arrear, it was held that, not having given him any notice of their in-

(y) *Doe v. Davies*, 7 Exch. 89; 21 L. J., Ex. 60. *Doe v. Goldwin*, 2 Q. B. 143.

(z) *Pinhorn v. Souster*, 8 Exch. 763;

22 L. J., Ex. 266. *Brown v. Metropolitan Counties Assurance Co.*, 28 L. J., Q. B., 236.

tention to treat him as tenant, they were not entitled to distrain. (a) ¹

1023. *When the mortgaged premises are in the possession and occupation of lessees or tenants holding under leases granted by the mortgagor prior to the making of the mortgage, the mortgagee, of course, takes the mortgaged premises subject to those leases. The mortgage in such a case operates as a grant of the reversion, and with it of the rent; and the mortgagee is entitled, as assignee of the reversion, to the rent reserved on such leases, after he has given the lessees notice of the mortgage, and required them to pay their rents to him. Though attornment is no longer necessary to perfect the title of a mortgagee of the reversion of the rent reserved on the demise, yet notice of the grant or mortgage must be given to the tenants to enable the mortgagee to maintain an action against them for use and occupation, or to distrain for arrears of rent. (b)* When there is no clause

(a) *Clowes v. Hughes*, L. R., 5 Ex. 160; 39 L. J., Ex. 62. *Moss v. Gullimore*, 1 Doug. 279; 1 Smith's L. C. 543. *Lumley v. Hodgson*, 16 East, 99.

(b) 4 & 5 Ann., c. 16, §§ 9, 10.

¹ See *Melody v. Chandler*, 3 Fairf. 284, 285; *Welch v. Whittemore*, 25 Me. 86. "As between mortgagee and mortgagor no estoppel of landlord and tenant exists against the latter. The mortgagee is rather the landlord, the mortgagor being in strict law considered as a quasi tenant at will." *Cowan, J.*, *Cameron v. Irwin*, 5 Hill, 280; and see *Hilliard on Mortgages*, ch. ix. §§ 3, 5, 7, 11, 45; *Greenleaf's Cruise*, 140 n; *Bacon v. McIntire*, Met. 87. Although, in a loose sense, a mortgagee in possession is said to be tenant at will of the mortgagor, yet he is not so within the reason of the letter of the Massachusetts Revised Statutes, 104, § 2. He is not a lessee or holding under a lessee, or holding demised premises without right after the determination of the lease. The remedies of a mortgagee are entirely of a different character, clearly marked out by law. *Hastings v. Pratt*, 8 Cush. 121-123.

in the mortgage-deed giving to the mortgagor a right to the possession of the mortgaged premises, and creating a tenancy between the mortgagor and mortgagee, the mortgagee has a right to all the rents which have become due subsequently to the making of his mortgage, and which are unpaid at the time the occupying tenant from whom such rent is due receives notice of the mortgage. The tenant is not bound to pay the mortgagee without notice; and, if, at the time he receives notice, he has paid the rent to the mortgagor, it is a good excuse for him; (c) but payment of the rent to the mortgagor before it is due is no answer to a claim by the mortgagee for rent which has accrued due after the giving of the notice. (d) When lands in the possession of tenants holding underleases have been mortgaged, the mortgagee, as assignee of the reversion, may sue on any of the covenants which are annexed to the reversion and run with the land; and he is also liable to be sued thereon. Hence it followed that, whenever a man had demised to a tenant at a rent, and then had mortgaged his reversion, the mortgagor could not bring an action of ejectment, nor an action for the rent in his own name, nor sue upon any covenants running with the land, whether the mortgagee had or had not given notice of the mortgage, for the tenant might avail himself of the defence that the lessor had assigned all his estate and interest in the demised premises. (e) But, by the Supreme Court of Judicature Act, (f) "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no

(c) Buller, J., *Birch v. Wright*, 1 T. R. 384, 385.

(d) *Cook v. Guerra*, L. R., 7 C. P. 132; 41 L. J., C. P. 89.

(e) *Doe v. Edwards*, 5 B. & Ad.

1065. *Mountnoy v. Collier*, 1 Ell. & Bl. 636.

(f) 36 & 37 Vict. c. 66, § 25 (5) This Act is not to come into operation until the 1st of Nov., 1875.

notice of his intention to take possession, or to enter into the receipts of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." And if the mortgagee does not give notice to the tenant to pay the rent to himself, but permits the mortgagor to go on receiving the rent as before the mortgage was made, and does not think fit to interfere with the tenancy, the mortgagor is deemed in law to have authority from the mortgagee to distrain for the rent if it falls into arrear, the rent being the obvious and natural source for the mortgagor to obtain funds to enable him to pay the interest of the mortgage debt. He may distrain in the mortgagee's name as the mortgagee's bailiff; and if he distrains in his own name, he may justify in the name of the mortgagee. (g)

1024. *Leases by the mortgagor after the making of the mortgage.*—If no right of possession is reserved by the mortgage-deed to the mortgagor, and no tenancy is created between him and the mortgagee, and the mortgagor remains in the possession on sufferance after the making of the mortgage, and demises the mortgaged land to a tenant at a rent, the demise is absolutely void as against the mortgagee, but it is nevertheless valid, by estoppel, as between the mortgagor and his tenant until the mortgagee interferes, and the mortgagor is entitled to receive the rent for his own use, and to distrain for it in his own name, if

(g) *Trent v. Hunt*, 9 Exch. 14; 22 L. J., Ex. 320. *Snell v. Finch*, 9 Jur. N. S. 333.

it is not paid when due, so that a tenant who has come in under the mortgagor after the mortgage, and has neither paid rent to the mortgagee, nor been evicted by him, either actually or constructively, before the day of payment, can not defend an action by the mortgagor for that rent. Mere notice by the mortgagee to the tenant to pay the rent to the mortgagee is not an attornment to the latter, and is, without actual payment, no answer to the claim for rent. (*h*) And if the mortgagor assigns his interest, such as it is, his assignee has the same title by estoppel against the lessee, and, as assignee of the reversion by estoppel may sue the tenant for waste in breach of the covenants in the lease. (*i*) As between himself and the tenant, the mortgagor may exercise all the ordinary rights of a landlord, unless the mortgagee interferes to prevent him; for the lessee can not deny the title of his lessor at the time of granting the lease. (*k*) But the tenant who comes in under such a demise may be treated by the mortgagee as a trespasser, and may be ejected without any notice to quit, (*l*) unless the mortgagee is a party to, or has authorized the making of, the lease; or he may be converted into a tenant to the mortgagee by continuing to occupy the mortgaged premises by the sufferance and permission of the mortgagee, after he has received notice of the mortgage. The mortgagee, can not, by giving notice to the tenant, entitle himself to distrain for the rent that the tenant has contracted to pay to the mortgagor; nor can he sue for any arrears of such rent. (*m*)

(*h*) *Hickman v. Machin*, 4 H. & N. 720; 28 L. J., Ex. 310.

(*i*) *Cuthbertson v. Irving*, 29 L. J., Ex. 485; 6 H. & N. 135.

(*k*) *Wheeler v. Branscombe*, 5 Q. B. 373. *Wilton v. Dunn*, 17 Q. B. 294.

(*l*) *Keech v. Hall*, 1 Doug. 21. *Thunder v. Belcher*, 3 East, 449.

(*m*) *Rogers v. Humphreys*, 4 Ad. & E. 299. *Wilton v. Dunn*, 21 L. J., Q. B. 63. *Turner v. Cameron's Coal, &c.*, 5 Exch. 932.

But, if there is a clause in the mortgage-deed creating a tenancy as between himself and the mortgagor at a specified rent, he may, of course, distrain on the mortgaged premises for that rent. And, if rent is due on a demise from the mortgagee to the mortgagor after the making of the mortgage, and the mortgagee threatens to distrain for such rent, or to evict the tenant, and the latter pays the rent to avoid the threatened distress or eviction, such payment is a good payment as against the mortgagor, on the ground that the tenant has been compelled to pay for the mortgagor what the mortgagor ought himself to have paid. (*n*)¹

1025. *Notice of the mortgage to the lessee* creates a new tenancy between the tenant and the mortgagee, and enables the latter to sue for a reasonable satisfaction for the use and occupation of the property by the tenant subsequent to the receipt by him of the notice. (*o*) If the mortgagee gives the tenant notice to pay

(*n*) *Johnson v. Jones*, 9 Ad. & E. 809. *Mayor of Poole v. Whitt*, 15 M. & W. 577.

(*o*) *Waddilove v. Barnett*, 2 Bing., N. C. 543. *Carpenter v. Parker*, 3 C. B., N. S. 237; 27 L. J., C. P. 78.

¹ If a mortgagor lease for years, the lessee may redeem. *Bacon v. Bowdoin*, 22 Pick. 401; *Haven v. Adams*, 4 Allen, 80; *McCall v. Lennox*, 7 S. and R. 308; *Hutchinson v. Dearing*, 20 Ala. 798; and *Barelli v. Schymanski*, 14 La. Ann., 47. Upon the ground that a mortgagor has no right to make a lease of the mortgaged premises which will be binding upon the mortgagee, there will be no privity between such tenant and a purchaser at the foreclosure sale. The purchaser will acquire a good title although the tenant is not made a party to the decree. *McDermott v. Burke*, 16 Cal. 510. If a mortgagor has, after condition broken, taken from the mortgagee a lease for years, conveying to a third person during such tenancy, the mortgagee may still consider him, at the end of his term, to be in possession as mortgagor and not as tenant from year to year, and evict him at any time without notice. *Stedman v. Gassett*, 18 Vt. 346.

his rent to him, and the tenant continues in possession after the receipt of the notice, he will be deemed to hold as tenant at will to the mortgagee at the rent reserved in the lease ; but, as soon as rent has been paid to and accepted by the mortgagee, the tenancy will be converted into a yearly tenancy. (*p*) A mortgagee who gives notice of the mortgage to a tenant let into possession by the mortgagor subsequently to the making of the mortgage, can not maintain an action for mesne profits in respect of the occupation of the land by such tenant prior to the receipt of the notice ; for the doctrine of relation applies only as between disseisor and disseisee, and an estate which was lawful at its commencement can not be made tortious by a subsequent act. (*q*) Neither can the mortgagee maintain an action against such tenant for the recovery of any satisfaction in respect of the use and occupation of the mortgaged property prior to the receipt of the notice ; for there is no contract between the mortgagee and the tenant before notice of the mortgage. (*r*)

1026. *Equity of redemption of the mortgagor.*—Equity, looking at the substance and not at the form of the contract of mortgage, regards it as a mere pledge of land to secure the payment of a debt, and will not, consequently, suffer the land to be forfeited, by reason of the non-payment of the mortgage debt at the exact time or place or in the particular mode specified. The mortgagor is considered to be the owner of the equitable estate, and to be entitled to redeem the estate on payment of the mortgage debt and interest, until his right of redemption has been barred

(*p*) *Doe v. Bucknell*, 8 C. & P. 566. 944. *Buller, J.*, 1 T. R. 382.

Brown v. Storey, 1 Sc. N. R. 16.

(*r*) *Turner v. Cameron's Coal, &c.*

(*q*) *Litchfield v. Ready*, 5 Exch. 5 Exch. 932.

by a decree of foreclosure. The equitable interest in the land is denominated "the equity of redemption," and is, in truth, the mortgagor's old estate, unaffected in equity by the legal forfeiture, but encumbered with the lien of the pledgee. There may be a seizin of it just the same as of any other estate. It may be devised, granted, mortgaged, or entailed with remainders; (s) and it will follow the same line of descent as the land itself would have followed if no mortgage had been made. Thus, if the mortgaged land be of gravel-kind tenure, the equity of redemption will be divisible amongst the heirs of the mortgagor; if, on the other hand, the tenure be Borough-English, the equity of redemption will descend to the youngest son. (t)

Equity treats every contract as a pledge, which is, in principle and effect, a pledge, whatever name the parties may choose to give to the transaction, and whatever may be the disguises resorted to for concealing the real nature of the contract. Therefore, if an estate is conveyed in consideration of a sum of money, and the conveyance appears upon the face of it to be an absolute sale and conveyance, but is accompanied by a contemporaneous deed, whereby the grantee covenants to re-convey the property to the grantor by a day named, on repayment of the consideration-money and the expenses of the conveyance, the transaction will be treated as a pledge of land to secure payment of a debt, and the grantor will be admitted to redeem long after the time appointed for the re-conveyance has elapsed. (u) But, if the parties intended an abso-

(s) *Casborne v. Scarfe*, 1 Atk. 605.

(u) *Williams v. Owen*, 10 Sim. 386.

(t) *Fawcett v. Lowther*, 2 Ves. sen. 303. *Dixon v. Saville*, 1 Bro. C. C. 326.

Sevier v. Greenway, 19 Ves. 413.

Manlove v. Bale, 2 Vern. 84.

lute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not, of itself, entitle the vendor to treat the transaction as a pledge, and to redeem. "The question always is, was the original transaction a *bonâ fide* sale, with a contract for a re-purchase; or was it a mortgage under the form of a sale?" (x) Whenever a transfer of property has been made to trustees upon trusts which are, in principle and effect, to secure, by sale or other means, the repayment of money advanced, the transfer will be deemed a pledge and the right of redemption will exist; and a contract which is once a pledge will be always so until the right of redemption has been extinguished by foreclosure or by the statute of limitations, or has been released by a *bona fide* contract made subsequently to the mortgage. (y)

The mortgagor's right to redeem can not be clogged or extinguished by any collateral agreement entered into contemporaneously with the mortgage. If, therefore, the mortgagee enters into a contract with the mortgagor at the time of the loan of the money, for the absolute purchase of the lands for a specific sum in case of default made in payment of the purchase-money at an appointed time, the contract will be set aside as being oppressive to the debtor, who is rarely prepared to discharge the debt at the exact time appointed. (z) But an agreement to give the mortgagee a preference of pre-emption in case of sale is valid, and will be enforced; (a) and a *bona fide* purchase of the equity of redemption effected subsequently to the mortgage, will be upheld. (b) When-

(x) *Williams v. Owen*, 5 Myl. & Cr. 503. *Barrel v. Sabine*, 1 Vern. 268.

(y) *Jason v. Eyres*, 2 Ch. C. 33. *Bell v. Car. er*, 22 L. J., Ch. 933.

(z) *Price v. Perrie*, 2 Freem. 258. *Jennings v. Ward*, 2 Vern. 520.

(a) *Orby v. Trigg*, 2 Eq. Ca. Abr 599.

(b) 15 Vin. Abr. 468, pl. 8.

ever a covenant is made by the mortgagor for further assurance, the latter can only be called upon to confirm the mortgage. (c) If an express clause of redemption is inserted in a mortgage-deed, this is not a power of revocation, or a condition, &c., for the benefit of the grantor, within the meaning of the Mortmain Acts. (d)¹

(c) *Atkins v. Uton*, 1 Lord Raym. (d) *Doe v. Hawkins*, 2 Q. B. 212.

36.

¹ The right of equitable redemption is a mere incorporeal hereditament (see *Wallington v. Gale*, 13 Mass. 483); and its history is given in *Hilliard on Mortgages*, ch. 1, § 39, as follows: "Although the legal estate is absolute, yet courts of equity, after their jurisdiction became well established in England, without any legislative enactment, thought that conscience and equity required them to break in upon the common law, and to grant relief by permitting the mortgagor at any reasonable time to redeem. . . . Chancery viewed the condition of a mortgage as a penalty or forfeiture against which equity ought to relieve, even though the deed expressly declared that unless the debt were paid by a certain day, the estate of the mortgagee should be absolute." Citing 2 *Greenl's Cruise*, 78; *Chapman v. Turner*, 1 Cal. 252; *Sampson v. Pattison*, 1 Hare, 536; 4 *Kent's Com.* 158; *Parsons v. Welles*, 17 Mass. 423. "In the fourteenth year of Richard II.," says Lord HALE, in *Roscarrick v. Barton* (1 Ch. Cas. 219), "Parliament would not admit of an equity of redemption." Of the history of the principle in Massachusetts, said STORY, J., in *Gray v. Jenks* (3 Mass. 522): "It does not appear that before the provincial charter of Massachusetts, in 1692, there was any remedy at law for the mortgagor after breach of the condition; at least I have not been able to trace any in the colonial ordinances. Immediately after that charter, provision was made for the erection of a high court of chancery by the Act of 4 W. & M. ch. 5, and again, in a more complete form, by the Act of 5 W. & M. ch. 26. These statutes would have afforded the means of effectual relief, but the equity jurisdiction, not being relished in the province, these statutes soon fell, and every subsequent effort to establish a general court of chancery has proved abortive. The Provincial act of 9 Will. ch. 48, § 3, directed that upon satisfaction and payment of the mortgage, the mortgagee should, at the request of the mortgagor, cause such satisfaction and

1027. *Rights of mortgagees.*—Viewing the contract always as a pledge, equity recognizes the mortgagee's right, as pledgee, to the possession of the mort-

payment to be entered in the margin of the record of such mortgage in the register's office, and sign the same, which should 'for ever thereafter discharge, defeat, and release such mortgage, and perpetually bar all actions to be brought thereupon in any court of record,' and in case of the refusal of the mortgagee to make and sign such acknowledgment or otherwise discharge the mortgage and release the estate, the statute gave an action against the mortgagee for all damages for want of such discharge or release. The Act 10 W. 3, ch. 58, further provided that in real actions upon mortgage, the judgment should be conditional that the mortgagor, his heirs, &c., should pay the mortgagee, &c., such sum as the court should determine to be justly due therefor, within two months' time after judgment for discharging the mortgage, or that the plaintiff should recover possession of the estate sued for, and execution be awarded for the same; and it was further provided that when the mortgagee had entered into possession of the estate, the mortgagor should, upon tender of the money due, have a right to redeem the same at any time within three years after such entry, and that a bill in equity should lie in the courts of law for this purpose. These enactments continued in force until after the Revolution, and are substantially incorporated into the existing statutes of Massachusetts on the subject of mortgages." Alluding to the doctrine of equity of redemption, Chancellor KENT says: "The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law." A distinction is to be observed between the mortgagor's right to redeem before, and his right to redeem after, forfeiture, the first is a legal; the second is the purely equitable, right, and is alone correctly spoken of as the equity of redemption. *State v. Laval*, 4 McCord, 340; see *Rev. Stats. of N. C.* 266; *Thomp. Dig.* 355. Definitions of the equity of redemption are numerous, and as all assist in throwing light upon its nature, a few of them are subjoined. It has been said that an equity is an estate, see *Paulling v. Barron*, 32 Ala. 9; *Buchanan v. Munroe*, 22 Tex. 537; *Barcelli v. Schymanski*, 14 La. Ann. 47; a trusteeship in the mortgage for the mortgagor; see *Briggs v. Davis*, 20 N. Y. 15;

gaged estate, and will not interfere with any proceedings that may be taken by him to obtain possession of the mortgaged premises; but it will not suffer him

Smith v. Oley, 26 Miss. 296; Silvester v. Jarman, 10 Brice, 84; Coates v. Woodworth, 13 Ill. 654; Charles v. Clagett, 3 Md. 82; Bloomer v. Van Rensselaer, 15 Ill. 503; King v. Merchants, &c., 1 Seld. 547; Morgan v. Morgan, 10 Geo. 297; Little v. Brown, 2 Leigh, 353; Bell v. Hammond, Id. 416; a title in equity; Hilliard on M. ch. xv. § 4; Viscount v. Morris, 3 Hare, 402; "A well-defined interest in land having many of the attributes of general ownership;" DAVID, J., Pell v. Allmar, 18 N. Y. 139; it seems that it is not a chose in action; see Ellithorp v. Dewing, 1 Chipm. 143. The mortgagor's right to redeem never depends upon the possession of the land, but he may file his bill to redeem as well if he have the possession himself as if the mortgagee possesses it. Wood v. Jones, Meigs, 516. Everyone interested in the estate or coming in as privy in estate with the mortgagor, may redeem, and redemption will be decreed according to the priority of the claimants. Moore v. Beasom, 44 N. H. 215. One who possesses any legal or equitable interest in land by operation of law or otherwise in privity of title with the mortgagor, may redeem; but he must have an interest derived mediately or immediately from, through, or in the right of the mortgagor, so as to constitute him the owner of part of the mortgagor's original equity, otherwise it can not be affected by the mortgage, and needs no redemption. Smith v. Austin, 9 Mich. 465; see Elliott v. Patton, 4 Yerg. 10; Frink v. Murphy, 21 Cal. 108; Watts v. White, 12 Iowa, 230. One having an equitable lien may redeem, as, *e. g.*, a widow claiming a settlement for life under marriage articles; Hilliard on M., ch. xv., § 16; the one having the legal title; Id.; Dexter v. Arnold, 1 Sumn. 111; and see Wells v. Morse, 11 Vt. 17; Crafts v. Crafts, 13 Gray, 363; Bogert v. Coburn, 27 Barb. 233. A judgment creditor may redeem lands sold under a decree of foreclosure before the sale is confirmed, when the purchaser has paid the price and received a deed from the register. Jones v. Burden, 20 Ala. 382. Where land is sold under a mortgage or deed of trust, the mortgagor's right to redeem within two years under the statute is a mere equitable right, which can only be enforced in a court of equity; the mere tender of the amount required by law does not re-invest the legal title. Smith v. Anders, 21 Id. 292. The assignee of a subsequent mortgage—the grantee of

whilst in possession, to enter into any contract inconsistent with his limited interest as pledgee, or which will in anywise prejudice or interfere with the mortgagor's right of redemption. The mortgagee can not, consequently, before a decree of foreclosure has been pronounced, grant a lease, so as to bind the mortgagor, without the consent of the latter, except under an apparent necessity, and for the purpose of avoiding an apparent loss ; (*e*) nor, in the case of a mortgage of a renewable lease, can he release the right to renew. (*f*) And, when an advowson is the subject of mortgage, the mortgagee can not nominate on an avoidance of the church ; but the right of presentation remains vested in the mortgagor ; nor can any agreement be made to the contrary, as such an agreement is inconsistent with the nature and character of a pledge. (*g*) In the simple character of a pledgee of the estate, the mortgagee will be made amenable for all negligence and misconduct amounting to a breach of trust. If, therefore, he assigns his legal estate as mortgagee to a person in insolvent circumstances, he

(*e*) *Hungerford v. Clay*, 9 Mod. 1.(*g*) *Mackenzie v. Robinson*, 3 Atk.(*f*) *O'Reilly v. Featherstone*, 4 558. *Gardiner v. Griffith*, 2 P. Wms. P'igh, N. S. 161.

404.

the mortgagor's estate—and any one having acquired a subsequent interest in the property may redeem ; and see *Queensburgh Bank v. French*, 77 Conn. 129 ; *Mix v. Cowles*, 20 Id. 420 ; *Jarvis v. Woodruff*, 22 Id. 548 ; *Bridgeport Bank v. Eldridge*, 28 Id. 556 ; *Sheldon v. Bud*, 2 Root, 509 ; *Kirkham v. Dupont*, 14 Cal. 559 ; *Young v. Williams*, 17 Conn. 393. It is no defense to a suit by a wife for the redemption of mortgaged property that the price of the equity purchased after the execution of the mortgage was paid by her husband, and the mortgagee can not question her right on that ground. *Green v. Dixon*, 9 Wis. 532. The right of redemption is favored by courts, and where it is admitted in the pleadings, courts will not scan very closely the transaction out of which it is claimed to arise, for the purpose of defeating that right. *Briggs v. Seymour*, 17 Wis. 255.

will be compelled to account for the rents and profits of the land, as well after as before the assignment. (*h*) He will be bound, moreover, as pledgee of the estate, to take the same care of it as every prudent and cautious owner is in the habit of taking of his own property. He will be made responsible for waste and for all damage done to the property from pulling down buildings, unless the buildings were old and ruinous, and required removal. (*i*) He will be responsible also for cutting down timber, unless the security was defective, in which case he may fell it and sell it, and apply the proceeds in liquidating the mortgage-debt and interest. (*k*) When the mortgagor is left in possession of the mortgaged property, and receives the rents and profits thereof, he is not bound to render any account of such rents and profits to the mortgagee; (*l*) yet, equity, regarding the land as hypothecated for the mortgage-debt, will restrain the mortgagor from exercising his rights of ownership so as to deteriorate the value of the property and diminish the security of the creditor, and will, consequently, prevent him from cutting down timber, pulling down buildings, breaking up pasture-land, and committing waste; and, if he fells timber, an account will be decreed, and the produce applied, first in payment of the interest, and then in liquidation of the principal. (*m*)

1028. *Of the time within which the right of redemption may be exercised.*—A suit to redeem a mortgage must be brought within twenty years next after the time at which the mortgagee obtained possession

(*h*) 1 Eq. Ca. Abr. 327.

(*i*) *Hanson v. Derby*, 2 Vern. 392.
Hardy v. Reeves, 4 Ves. 480.

(*k*) *Witherington v. Banks*, Sel. C. C. 31.

(*l*) *Colman v. Duke of St. Albans*, 3

Ves. 26. *Ex parte Wilson*, 2 Ves. & B. 252. *Thomas v. Brigstocke*, 4 Russ. 64.

(*m*) *Farrant v. Lovel*, 3 Atk. 723.
Robinson v. Litton, Ib. 210.

or receipt of the rents or profits of the mortgaged estate, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, has been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or some person claiming through him; (n) in which case, the suit must be brought within twenty years after the last acknowledgment.¹ If there are several

(n) 3 & 4 Will. 4, c. 27, s. 28. As *Hansard v. Hardy*, 18 Ves. 455. to the acknowledgment in writing, see *Stansfield v. Hobson*, 22 L. J., Ch. Lucas v. Dennison, 13 Sim. 584. 657.

¹ See in *Alabama*, *Gunn v. Brantly*, 21 Ala. 633; *Arkansas*, *Anthony v. Anthony*, 23 Ark. 479; *California*, *Cunningham v. Hawkins*, 24 Cal. 403; *Georgia*, *Morgan v. Morgan*, 10 Ga. 297; *Illinois*, *Johnson v. Donnel*, 15 Ill. 57; *Indiana*, *Goodrich v. Friedersdorf*, 27 Ind. 308; *Iowa*, *Montgomery v. Chadwick*, 7 Iowa, 114; *Kentucky*, *Shannon v. Speers*, 2 A. K. Marsh, 311; *Maine*, *Phillips v. Sinclair*, 20 Me. 269; *Maryland*, *Lamar v. Jones*, 3 Har. & M. 328; *Massachusetts*, *Ayres v. Waite*, 10 Cush. 72; *Michigan*, *Reynolds v. Green*, 10 Mich. 355; *Mississippi*, *Boardman v. Cattell*, 21 Miss. 13 Sm. and M. 149; *Missouri*, *McNair v. Got*, 34 Mo. 285; *New Hampshire*, *Cilley v. Huse*, 40 N. H. 385; *New Jersey*, *Kinnaman v. Henry*, 6 N. J. Eq. 90; *Price v. Armstrong*, 14 Id. 41; *Gates v. Couron*, Id. 137; *New York*, *Moore v. Cable*, 1 Johns Ch. 385; *Slee v. Manhattan Co.*, 1 Paige, 48; *Bloomer v. Surgis*, 58 N. Y. 168; *North Carolina*, *Bailey v. Carter*, 7 Ired. Eq. 282; *Ohio*, *Robinson v. Fife*, 3 Ohio St. 551; *Pennsylvania*, *Tyron v. Munson*, 77 Pa. St. 25; *Rhode Island*, *Dexter v. Arnold*, 3 Sumn. 152; *Daniels v. Mowry*, 1 R. I., 151; *South Carolina*, *Miles v. King*, 5 S. C. (N. S.) 146; *Tennessee*, *Yarborough v. Newell*, 10 Yerg. 376; *Vermont*, *Hunt v. Tyler*, 2 Aik. 233; *Smith v. Blaisdell*, 17 Vt. 199; *Downer v. Fox*, 20 Id. 388; *Sanders v. Wilson*, 34 Id. 318; *Floyd v. Harrison*, 2 Rob. 161; *Knowlton v. Walker*, 13 Wis. 264. No decree can take away a statute right of redemption. *D'Wolf v. Huydn*, 24 Ill. 525. The equity of redemption is sometimes, by statute, given to others than the mortgagor in the different states, in which case different limitations are prescribed. Thus, in *Alabama*, it was held that a statute authorizing a redemption of mortgaged property by bona fide creditors is unconstitutional

mortgagors, or several persons entitled to redeem, an acknowledgment given to one is an acknowledgment to all; but, where there are several mortgagees, or

and void as to sales under mortgages made prior to its enactment. *Howard v. Bugbee*, 24 How. 461; *Bugbee v. Howard*, 32 Ala. 713. The grantor of real estate in trust that the trustee use the same and apply the proceeds to the payment of the debt intended to be secured thereby, may redeem at any time before a sale is made. *Hogan v. Lepretre*, 1 Port. 392; and see *Branch Bank v. Furness*, 12 Ala. 367; *Powell v. Williams*, 14 Id. 476; *Gliddon v. Andrews*, 14 Id. 733; *Jones v. Burden*, 20 Id. 382; *Adams v. McKenzie*, 18 Id. 698. And the equity of redemption after the law day of the mortgage has passed is assignable by deed. *Pauling v. Barron*, 32 Ala. 9. The redemption may be made by a subsequent mortgagee. *Kemmel v. Willard*, 1 Dougl. (Mich.) 217. The assignee of a subsequent mortgage; *Cott v. Henry* 13 Ark. 12; a subsequent purchaser; *Stone v. Welling*, 14 Mich. 514; a subsequent incumbrancer; *Frink v. Murphy*, 21 Cal. 108; a purchaser of part of the mortgaged premises; *Calkins v. Munsel*, 2 Root, 353; heirs; *Sheldon v. Bud*, 2 Id. 509; *Lamar v. Jones*, 3 Har & M. 328; but see *Smith v. Manning*, 9 Mass. 422; *Elliott v. Patton*, 4 Yerg. 10; a wife of the mortgagor of the homestead, in Illinois. *Whitcombe v. Sutherland*, 18 Ill. 578; a junior incumbrance, who is not made a party to the foreclosure of a prior mortgage, as against a purchaser at the foreclosure sale, and one redeeming from that sale; *Strang v. Allen*, 44 Ill. 428; a tenant for years—a mortgage made by his lessor; *Bacon v. Bowdoin*, 22 Pick. 401, 2 Met. 591; *Hamilton v. Dobbs*, 19 N. J. Eq. 277; a trustee; *Boyden v. Partridge*, 2 Gray, 190; the mortgagee of a reversionary interest to redeem a prior mortgage; *Smith v. Provin*, 4 Allen, 516; every one interested in the mortgaged estate, or coming in as privy in estate with the mortgagor, the redemption to be decreed according to the priority of the claimants; *Brewer v. Hyndman*, 18 N. H. 9; *Moore v. Beasom*, 44 Id. 215; the owner of an equity out of possession; *Hall v. Hall*, 26 Id. 240; a dowress or mortgage, which is an incumbrance on his right; *Opdyke v. Bartles*, 11 N. J. Eq. 133; a judgment creditor, *Stainback v. Geddy*, 1 Deo. & B. Eq. 479; *Angar v. Winslow*, 1 Clark (N. Y.) 251; *Brainard v. Cooper*, 10 N. Y. 356; a widow as against the mortgagee; *Denton v. Nanny*, 8 Barb. 618; a purchaser at a sheriff's sale; *Anon*, 1 Hayw. 482; an administrator of an

assignees of mortgagees, an acknowledgment signed by one is effectual only against the party signing it, where the latter has a divided interest in the mode pointed out in the statute. Where their interest is joint, the acknowledgment of one mortgagee is wholly inoperative. (o) If the mortgagor permits the mortgagee to hold possession of the mortgaged premises, and receive the rents thereof for twenty years without accounting in the character of mortgagee, (p) and without admitting in writing the mortgagor's title, the right of redemption is barred, and the mortgagee becomes the absolute owner. (q) Where the mortgagee is also tenant for life of the mortgaged estate, the statute of limitation does not begin to run against the mortgagor's title until the death of such mortgagee. (r) Where the plaintiff, in a suit of redemption,

(o) *Richardson v. Younge*, L. R., 10 Eq. 275; *ib.* 6 Ch. 478; 39 L. J., Ch. 475; 40 *ib.* 338.

(p) *Baker v. Wetton*, 14 Sim. 426. *Barron v. Martin*, 19 Ves. 327.

(q) *Rafferty v. King*, 1 Keen, 601.

(r) *Wynne v. Styan*, 2 Ph. 303. *Pears v. Laing*, L. R., 12 Eq. 41; 40 L. J., Ch. 225.

intestate; *Merriam v. Barton*, 14 Vt. 561; an attaching creditor; *Chandler v. Dyer*, 37 Vt. 343. A mortgagee seeking to foreclose a first mortgage need not tender redemption of a second mortgage. *Harshey v. Blackman*, 20 Iowa, 161. The first mortgagee can not, by purchase of the last equity, exclude intervening rights, but the second mortgagee may still redeem the first mortgage until foreclosure. *Thompson v. Chandler*, 17 Me. 377. A tenant in dower can not maintain a bill in equity to redeem land from a mortgage made by her husband and herself without offering to pay the whole amount due on the mortgage. *McCabe v. Bellows*, 7 Gray, 148. No person can come into equity for the redemption of a mortgage unless he is entitled to the legal estate of the mortgagor, or claims a subsisting interest in him; *Grant v. Duval*, 9 Johns. 591; and no agreement between the parties to a mortgage, although contained in the mortgage, will be permitted to deprive the mortgagor of the right to redeem; *Clark v. Henry*, 2 Cowan, 324; nor can a bill to redeem be maintained by one having some title to the mortgaged premises; *Purvis v. Brown*, 4 Ired. Eq. 413.

did not pay the principal and interest at the time appointed by the court, he was not allowed to redeem, although before the motion to dismiss was made he had tendered the amount reported to be due with the subsequent interest. (s) A mortgagee has no right to show the title of his mortgagor, and can not be compelled to state the contents of his title-deeds; (t) and he is not bound to produce his mortgage-deed to the devisee of the mortgaged estate until payment of principal and interest. (u)

1029. *Of the accounts to be taken.*—In taking an account of the amount of the mortgage-debt, interest and costs, the amount of the rents and profits received by the mortgagee, deducting expenses, will be set off against the interest and cost. The mortgagee is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be shown that he might have made so much of it but for his own willful default. (x) The general rule is, that he is only accountable for what he receives, and is not bound to take any particular trouble to make the most of another man's property. The court will not direct the master to fix, and charge the mortgagee with, an occupation rent, unless the plaintiff alleges and shows, not only that the mortgagee has been in possession of the mortgaged estate, and in receipt of the rents and profits thereof, but also that he has resided on and been in the occupation of the property, or of part of it. (y) The mortgagee may have interest upon interest if confirmed by

(s) *Faulkner v. Bolton*, 7 Sim. 319.
Novosielski v. Wakefield, 17 Ves. 417.

(t) *Lambert v. Rogers*, 2 Mer. 489.
Addison v. Walker, 4 You. & C. 447.

(u) *Browne v. Lockhart*, 10 Sim. 421.

(x) *Parkinson v. Hanbury*, L. R., 2 H. L. 1.

(y) *Trulock v. Robey*, 15 Sim. 265

the mortgagor. (*z*) He will be allowed, also, the necessary expenses attending the collection of the rents, and the costs of a receiver where a receiver is necessary; (*a*) but he can not charge for his personal trouble, although there may be an express agreement that he shall be entitled to do so. (*b*) In the case of a mortgage of a mine or quarry, the mortgagee will be entitled to all fair and reasonable expenses incurred in working the mine and rendering it productive; but he must not indulge in rash speculations. (*c*) And he has no right to charge upon the mortgagor the costs and expenses of unnecessary improvements, and is not permitted to increase the value of the estate in such a way as to make it impossible for the mortgagor, with his limited means, ever to redeem. This is what has been termed improving a mortgagor out of his estate. (*d*) But he will be entitled to charge all fair, customary, and necessary expenses in renewing leases, and in necessary repairs and moderate improvements. (*e*) If, in taking the accounts, the mortgagor proves the estate to have been let at a certain rent any time during the mortgagee's possession, the onus will be thrown on the mortgagee to show that such was not the rent during the whole period of his possession. (*f*) If no interest is in arrear when the mortgagee takes possession, or the rents considerably exceed the interest, annual rests of rents received will be ordered to be taken; (*g*) but the

(*z*) *Blackburn v. Warwick*, 2 Y. & C. 92.

(*a*) *Davis v. Denby*, 3 Mad. 170.
Langstaffe v. Fenwick, 10 Ves. 405.
 See also the 23 & 24 Vict. c. 145, ss. 11-24.

(*b*) *French v. Baron*, 2 Atk. 120.

(*c*) *Rowe v. Wood*, 2 Jac. & Walk.

(*d*) *Sandon v. Hooper*, 6 Beav. 246.

(*e*) *Scholefield v. Lockwood*, 33 L. J., Ch. 106.

(*f*) *Blacklock v. Barnes*, Sel. C. C. 53.

(*g*) *Shephard v. Elliott*, 4 Mad. 254. *Gould v. Tancred*, 2 Atk. 533.

court does not in general direct annual rests, if there were arrears of interest at the time the mortgagee possessed himself of the mortgaged premises; and, if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable until the whole of the mortgage-debt has been paid off. But, where a mortgagee in possession came to an account with the mortgagor, whereby all the arrears of interest, &c., were converted into principal, leaving thereby no arrears, and he continued in possession, the rent being more than sufficient to keep down the interest, the court decreed annual rests. (*h*) In taking the account the mortgagor is entitled to the benefit of set-off. (*i*) If the mortgagor has given notice of his intention to pay off the mortgage by a given day, and the payment of the money and the redemption of the estate are postponed by reason of the mortgagee's having lost some of the title-deeds, the mortgagor will not be bound to pay interest after the day on which he was ready to pay off the principal. The mortgagee, moreover, must indemnify the mortgagor against the consequences of the loss of the deeds. (*k*) The party seeking to redeem has, in general, to pay the costs of the suit; but when the mortgage-debt, interest, and costs have been tendered prior to the filing of the bill, and the mortgagee has put forward unjust and unfounded claims, and has refused to re-convey, except on payment of money which he had no right to demand, the court has thrown the burden of the costs upon him. (*l*)

1030. *Registration of mortgages.*—Mortgages of

- | | |
|---|--|
| (<i>h</i>) <i>Wilson v. Cluer</i> , 3 Beav. 136. | V. C. E. |
| <i>Finch v. Brown</i> , <i>Ib.</i> 70. | (<i>l</i>) <i>Morley v. Bridges</i> , 2 Col. C. C. |
| (<i>i</i>) <i>Agra and Masterman's Bank, ex parte Anderson</i> , 36 L. J., Ch. 73 | 621. <i>Montgomery v. Calland</i> , 14 Sim. |
| (<i>k</i>) <i>Midleton v. Eliot</i> , 11 Jur. 742. | 79. <i>Roberts v. Williams</i> , 4 Hare, |
| | 129. |

lands in the county of Middlesex, and equitable charges thereon, must be registered. (*m*)¹

1031. *Re-conveyance of the estate.*—If the mortgage-money is not paid at the time appointed, the legal estate granted is, as we have before seen, discharged of the condition, and becomes absolutely vested in the mortgagee. If, at a subsequent period, the mortgagee receives the mortgage-money pursuant to any previous parol agreement to enlarge the time of payment, or of his own free will, the legal estate is not re-vested in the mortgagor, but remains the property of the mortgagee until it has been re-conveyed by deed. But, whenever the mortgage-money and interest have been paid back and received by the mortgagee, or the mortgagor has tendered, or is ready and offers to pay it with costs, the court will compel the mortgagee to receive it and execute a re-conveyance of the estate so long as the mortgagor's right to redeem has not been foreclosed, or extinguished by effluxion of time.

(*n*) When a particular time is fixed for the repayment of the money advanced, and the re-transfer of the property to the mortgagor, the mortgagee can not be compelled to receive the money and relinquish the property, or to re-convey it before the appointed period. (*o*) After the mortgagor has made default in payment of the mortgage-debt at the time appointed, he must give six calendar months' notice to the mortgagee of his intention to pay off the mortgage.

1032. *Foreclosure and sale.*—The mortgagee, on

(*m*) *Moore v. Culverhouse*, 27 Beav. 639; 29 L. J., Ch. 419. *Wright v. Stansfield*, 28 Ib. 183. *Neve v. Pennell*, 2 H. & M. 170; 33 L. J., Ch. 19. *In re Wright's Mortgage Trust*, L. R., 16 Eq. 41.

(*n*) *Walker v. Jones*, L. R., 1 P. B. 50; 35 L. J., P. C. 30. *Oxford and Canterbury Hall Co., in re*, L. R., 5 Ch. 433; 39 L. J., Ch. 775.

(*o*) *Brown v. Cole*, 14 L. J., Ch. 167.

¹ See *ante*, vol. ii., note 1, p. 32.

non-payment of the mortgage-debt at the time appointed, may claim a foreclosure of the equity of redemption, and may obtain an order for the mortgagor or other party claiming the right of redemption, to pay the mortgage-debt and interest and redeem the estate within a certain period; and, in default of his so doing, the court will make a decree vesting the mortgaged premises in the mortgagee as his own property, or will order the estate to be sold. (*p*) Until the mortgagee is actually paid off by his own consent, or by decree of the court, he retains the character of mortgagee, with all the rights incident thereto, and may therefore claim a foreclosure, notwithstanding a notice by the mortgagor to pay off the mortgage, and even notwithstanding a decree for redemption. (*q*)

Before a decree for foreclosure can be obtained, all parties entitled to the mortgage-money must be brought before the court, and be made parties to the proceedings. (*r*) When a mortgage is paid off, the mortgagee becomes a trustee of the title-deeds, for the mortgagor, and is answerable to the latter for the loss of the deeds. (*s*) A decree, for foreclosing the right of redemption of an infant must give the infant a day to show cause against the decree after he attains twenty-one. (*t*) Although it has been said that a foreclosure only seeks the exclusion of an equity, yet it is, in substance, a suit for the recovery of money. The statute of limitations, therefore, may be

(*p*) 15 & 16 Vict. c. 86, s. 48. *Jenkin v. Row*, 5 De G. & S. 107. 7 Geo. 2, c. 20. *Lushington v. Price*, 9 Sim. 651.

(*q*) *Grugeon v. Gerrard*, 4 Y. & C. 119.

(*r*) *Palmer v. Carlisle* (Earl of), 1 Sim. & Stu. 423.

(*s*) *Brown v. Sewell*, 22 L. J., Ch. 1063. *Hornby v. Matcham*, 16 Sim. 327.

(*t*) *Price v. Carver*, 3 Mylne & C 157.

pleaded to a claim of foreclosure. (*u*) If, after a claim for foreclosure has been brought by a mortgagee in possession praying a sale, it is found that the rents and profits received by him were sufficient to satisfy the mortgage-debt, and that nothing was due to the mortgagee at the commencement of the action, he will be ordered to pay all the costs, including those of the reference and the taking of the accounts; (*x*) and, if the mortgagee, after the commencement of his action, assigns over his mortgage, he will have to pay all the costs thereby rendered necessary to bring his assignee before the court. (*y*) The court may direct a sale instead of a foreclosure, under the 15 & 16 Vict. c. 86, s. 48, without the consent of the mortgagor. (*z*)

1033. *Enlargement of the time for payment.*—The time appointed by the decree for payment of the mortgage-debt will be enlarged by the court, even after the decree has been made, and the mortgagee has been in possession for many years under it, if any fair and reasonable ground can be shown for the proceeding; and unfair conduct in obtaining the decree will itself open the decree. (*a*) When the time for payment is enlarged, all subsequent interest will be computed on the aggregate sum found due for principal, interest, and costs. (*b*) If the mortgagee has received rents between the date of the master's report and the day appointed for the payment, the court will refer the

(*u*) *Dearman v. Wyche*, 9 Sim. 570. But see *Lord St. Leonards' Practical Treatise on the New Statutes relating to Property*, 2nd ed. p. 139, s. 51.

(*x*) *Binnington v. Harwood*, 1 Turn. & Russ. 477.

(*y*) *Barry v. Wrey*, 3 Russ. 465. As to foreclosure of separate mort-

gages and foreclosure by claim, see *Smeathman v. Bray*, 15 Jur. 1051.

(*z*) *Newman v. Selfe*, 33 Beav. 522; 33 L. J., Ch. 527.

(*a*) *Eyre v. Hanson*, 2 Beav. 478. *Jones v. Creswicke*, 9 Sim. 304. *Cocker v. Bevis*, 1 Ch. C. 61.

(*b*) *Bruere v. Wharton*, 7 Sim. 483.

report back to the master to continue the accounts and appoint a new day for payment. (*c*) When the mortgagor has brought his action to redeem, and a day has been appointed for payment, the court will not in general enlarge the time. (*d*)

1034. *Of the different remedies of the mortgagee.*
—Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor becomes entitled to the estate; but, if he obtains part payment only, he may go on with a claim for foreclosure, and foreclose for the remainder. On the other hand, if he forecloses in the first instance, and the value of the estate proves insufficient to satisfy the debt, he may, while the mortgaged estate remains in his power, sue on the bond or covenant; but in so doing he opens the foreclosure, and the mortgagor thereupon becomes entitled to redeem. If, after foreclosure, he sells the estate, and realizes less than what is due to him, he can not bring an action after such sale, and after he has disabled himself from restoring the estate, to recover from the mortgagor, upon the collateral personal securities, the difference between the price realized on the sale and the original mortgage debt. (*e*) Nor can he sue on bonds and collateral securities given to secure payment of the debt, unless he is in a condition to re-convey the estate and deliver up the title-deeds. (*f*)

1035. *Powers of sale.* (*g*)—A mortgagee, having an absolute power of sale on failure of payment of the

(*c*) *Ellis v. Griffiths*, 7 Beav. 83.

(*d*) *Novosielski v. Wakefield*, 17 Ves. 417.

(*e*) *Lockhart v. Hardy*, 9 Beav. 349.
Burnell v. Martin, 2 Doug. 417.

(*f*) *Walker v. Jones*, L. R., 1 P. C. 50; 35 L. J., P. C. 30. *Burrell v. Smith*, L. R., 7 Eq. 399; 33 L. J., Ch. 332.

(*g*) See the 23 & 24 Vict. c. 145, ss. 11-24.

mortgage-debt and interest, must exercise reasonable discretion and prudence in the conduct of a sale, so as to obtain as large a price as can with due diligence and attention be obtained. (*h*) A power given to a trustee in a mortgage-deed, to sell on the request of the mortgagor, does not necessarily convey to the trustee a right to enter upon the mortgaged premises. (*i*) Where there are several mortgages of several estates to the same mortgagee for distinct debts, the proceeds of the sale of each estate must be applied solely in liquidation of the particular debt charged thereon, so that the surplus from one estate can not be applied to make good the deficiency of another estate. (*k*) There is nothing to prevent a puisne mortgagee from purchasing the mortgaged property upon the exercise by a prior mortgagee of his power of sale; and, if he does so purchase, he will acquire an absolute irredeemable title as against the mortgagor. (*l*) First and second mortgagees may join in selling; and each may give a separate receipt for his portion of the purchase-money to the purchaser. (*m*)

1036. *Of the tacking of arrears of interest and incumbrances.*—Upon the principle that he who seeks equity shall do equity, the court will not enable a mortgagor to redeem his estate, except upon the terms that he pays all arrears of interest for payment of which he is personally liable, whether the arrears do or do not constitute a charge upon the mortgaged premises, (*n*) and also all the costs and expenses nec-

(*h*) *Matthie v. Edwards*, 2 Coll. C. 465. *Kirkwood v. Thompson*, 2 De G. J. & S. 613. *Marriott v. Anchor Reversionary Company*, 30 L. J., Ch. 122, 571.

(*i*) *Watson v. Waltham*, 2 Ad. & E. 485.

(*k*) *Ex parte Bignold*, 2 Deac. 66.

(*l*) *Shaw v. Burney*, 34 L. J., Ch. 257; 33 Beav. 494.

(*m*) *M'Garogher v. Whieldon*, 34 Beav. 107.

(*n*) *Elvy v. Norwood*, 21 L. J., Ch. 716; 5 De G. & S. 240.

essarily incurred by the mortgagee in maintaining the title to the estate, and in repairing and preserving the mortgaged property, and all debts due to him from the mortgagor in respect of which he has a lien upon the land sought to be redeemed. (*o*) If, therefore, the mortgagee has advanced money to the mortgagor beyond the amount secured by the mortgage, expressly by way of further charge on the mortgaged premises or on a judgment, statute, or recognizance, these subsequent advances must be repaid before the court will order the mortgagee to re-convey the estate. But, if there is no lien on the land in respect of such subsequent advances, a re-conveyance will be ordered independently of them. (*p*) A bond or simple contract debt can not be tacked on to a mortgage as against the mortgagor himself; but it may as against the heir or beneficial devisee, or the executor of a mortgagor for a term of years, coming to redeem, (*q*) unless there be a devise for payment of debts, in which case the mortgagee must come in upon the bond rateably with the other creditors. (*r*) No bond or simple contract debt can be tacked on to the mortgage as against mesne incumbrancers having a lien upon the land, (*s*) nor as against the assignee or mortgagee of the equity of redemption, or creditors, or purchasers for a valuable consideration. (*t*) As he who seeks equity must do equity, the court will not, where two estates have been severally mortgaged between the same parties to secure the repayment of several debts, and the title to

(*o*) *South v. Bloxham*, 2 H. & M. 457; 34 L. J., Ch. 369.

(*p*) *Baker v. Harris*, 16 Ves. 397.

(*q*) *Challis v. Cashorn*, Pre. Ch. 407.
Morret v. Paske, 2 Atk. 53. *Archer v. Snatt*, 2 Str. 1107. *Coleman v. Winch*, 1 P. Wms. 775.

(*r*) *Heams v. Bance*, 3 Atk. 630.
Price v. Fastnedge, Amb. 685.

(*s*) *Lowthian v. Hasel*, 3 Bro. C. C. 162.

(*t*) *Anon.*, 2 Ves. sen. 662. *Adams v. Claxton*, 6 Ves. 225.

one estate proves defective, enable the mortgagor or his assignee (*u*) to redeem one mortgage without paying off both. (*x*) The right of a mortgagee to unite two securities from the same mortgagor exists equally in foreclosure and redemption suits. (*y*)

1037. *Priority of incumbrances and mortgages.*—If the mortgagee neglects to ask for the title-deeds of the mortgaged property, and to secure the possession of them, he will take his mortgage subject to any lien which the holder of the deeds may be able to establish on the estate. (*z*) If a party, having knowledge of a deposit of title-deeds, avoids making any inquiry into the circumstances under which the deposit was made, and does not require the deeds to be delivered up to him, his claim as mortgagee will be postponed to that of the depository of the deeds. (*a*) Where the creditor of a London publican took from the latter a mortgage as a security for an antecedent debt, knowing at the time that the publican was indebted to his brewers, and that it was the ordinary practice of London publicans to deposit their leases with their brewers as a security for debts due to them, and made no inquiry upon the subject, and the publican's lease had, in fact been deposited with the brewers as a security for the balance of their account for beer, it was held that the lien of the brewers had priority over the claim upon the mortgage; (*b*) but a first mortgagee, omitting to ask for, or parting with, the title-deeds, will not on that account be postponed to a subsequent incumbrancer,

(*u*) *Beavor v. Luck*, L. R., 4 Eq. 537; 36 L. J., Ch. 865.

(*x*) *Jones v. Smith*, 2 Ves. jun. 376. *Roe v. Soley*, 2 W. Bl. 725.

(*y*) *Selby v. Pomfret*, 1 Johns. & H. 356; 30 L. J., Ch. 770.

(*z*) *Worthington v. Morgan*, 18 L. J., Ch. 233. *Perry-Herrick v. Atwood*, 27 L. J., Ch. 121.

(*a*) *Birch v. Ellames*, 2 Anstr. 427.

(*b*) *Whitbread v. Jordan*, 1 You. & C. 303. *Hewett v. Loosemore*, 21 L. J., Ch. 69.

with whom the deeds have been deposited, without notice of the prior charge, unless in his conduct there appears to be such negligence as amounts to fraud. (c) Where, however, the mortgagee of leasehold property lent the lease to the mortgagor, for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he borrowed the money of the mortgage, and the mortgagor borrowed the money from his bankers upon the security of a deposit of the lease, without giving them notice of the mortgage, it was held that the mortgage must be postponed to the banker's lien. (d) Equitable incumbrances and charges upon the mortgaged property of which the mortgagee had actual or constructive notice at the time he effected the mortgage, will have priority over him according to their respective dates; (e) and, when any party, having knowledge of such facts as would lead any person using ordinary caution to make further inquiries, studiously avoids making any inquiry at all, he must be taken to have notice of those facts which, if inquired into, would have been readily ascertained; for such negligence might otherwise be readily made a cloak for fraud. If a party appears to have had even a suspicion of the truth, and then makes no inquiry, his conduct is strong evidence of *mala fides*. (f) Whenever a mortgagee has actual or constructive notice of an existing equitable incumbrance at the time he accepts the mortgage he will not be permitted to avail himself of an assignment of an outstanding term prior to both, in order

(c) *Dowle v. Saunders*, 2 H. & M. 92.
242; 34 L. J., Ch. 87. *Hunt v. Elmes*, 30 L. J., Ch. 255. *Layard v. Maud*, L. R., 4 Eq. 397; 36 L. J., Ch. 669.

(d) *Briggs v. Jones*, L. R., 10 Eq.

(e) *Beckett v. Cordley*, 1 Bro. C. C. 353. *Wilmot v. Pike*, 5 Hare, 14. *Wormald v. Maitland*, 35 L. J., Ch. 69.

(f) *Jones v. Smith*, 1 Hare, 43.

to obtain a priority over such equitable incumbrance. (*g*)

1038. *Tacking*.—"By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 7, it is enacted that, after the commencement of that Act (7th August, 1774), no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land, and full effect shall be given in every court to this provision although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always that this section shall not take away from any estate, right, title, or interest, any priority or protection which but for this section would have been given or allowed thereto, as against any estate or interest existing before the commencement of this Act." Where several mortgages have been executed of the same property, they will, as a general rule, have priority according to date; but a third mortgagee buying in the first mortgage may unite his securities and postpone the second mortgagee, provided he had no notice of the second mortgage at the time he lent his money on the third mortgage; and this HALE, C. J., called "a plank gained by the third mortgagee, tabula in naufragio." (*h*) And this right is not affected by the fact that the second mortgagee is really prior in point of date, and is merely postponed by the operation of the registry Acts, nor by the circumstance that the incumbrance, in respect whereof the right to consoli-

(*g*) Willoughby v. Willoughby, 1 T. R. 763. Allen v. Knight, 15 L. J., Ch. 430.

(*h*) Brace v. Duchess of Marlbor-

ough, 2 P. Wms. 411. Robinson v. Davison, 1 Bro. C. C. 63. Belchier v. Butler, 1 Eden 523. Hopkinson v. Rolt, 9 H. L. C 514; 34 L. J., Ch 468.

date is claimed, is equitable merely, and that the second mortgagee had no notice thereof. (*i*) But a prior mortgagee who has an assignment of a third mortgage as a trustee only can not tack the two mortgages together to the prejudice of intervening incumbrancers; (*k*) nor are the priorities of successive incumbrancers altered by one of them getting in the legal estate from one who is a trustee for them all. (*l*) A second mortgagee who obtains an assignment of a term to attend the inheritance, and has all the title-deeds, may recover in ejectment against the first mortgagee, if he had no notice of the first mortgage at the time he lent his money; for the first mortgagee, by leaving the title-deeds in the hands of the mortgagor, enabled the latter to commit a fraud. (*m*) And all mesne incumbrancers who take protection against subsequent incumbrancers have a better equity than the prior incumbrancers who have neglected to take such protection, and are consequently entitled to priority, provided their advances have been made without notice of any prior charge. Therefore a second incumbrancer of an equitable interest who gives notice to the trustees in whom the legal estate is vested, obtains priority over a previous incumbrancer who has not given such notice. (*n*) A first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances made by him after notice of the second mortgage. (*o*)

1039. *Every priority may be lost by fraud.*—If,

(*i*) Neve v. Pennell, 2 H. & M. 170.

(*k*) Morret v. Paske, 2 Atk. 52.

(*l*) Sharples v. Adams, 32 Beav. 213.

(*m*) Goodtitle v. Morgan, 1 T. R.

(*n*) Foster v. Blackstone, 1 Mylne & K. 297. S. C., Foster v. Cockerell, 3 Cl. & Fin. 456. Timson v. Ramsbottom, 2 Keen, 35.

(*o*) Hopkinson v. Rolt, 9 H. L. Cas. 514; 34 L. J., Ch. 463.

therefore, a creditor, who has a mortgage or lien on the estate of his debtor, fraudulently conceals the fact, and thereby enables such debtor to perpetrate a fraud upon a subsequent mortgagee, his claim will be postponed to the claim of the latter under such second mortgage. (*p*) The want of possession of title-deeds by a first mortgagee leads to a prima facie presumption of fraud, and will cause such first mortgagee so without the deeds to be postponed to a second mortgagee in possession of the deeds, unless the first mortgagee has been defrauded of the deeds or has been deceived by his own solicitor, and the presumption of collusion or of gross negligence in failing to seek for and obtain possession of the deeds can be rebutted. (*q*)

1040. *After a decree to settle priorities there can be no tacking of subsequent debts and incumbrances to prior securities.* (*r*) The second mortgagee is entitled to pay off, and to have a conveyance of the mortgaged estate from the first mortgagee; and the latter ought, without the compulsion of judicial proceedings, to accept payment from the second mortgagee, and convey the mortgaged estate to him, whether the mortgagor does or does not consent thereto. Where, therefore, a first mortgagee, after receipt of the usual notice by a second mortgagee of the intention of the latter to pay off the mortgage, filed a bill of foreclosure, and the second mortgagee tendered the mortgage-money and costs to the first mortgagee, and the latter declined to accept it, it was held that

(*p*) Ibbotson v. Rhodes, 2 Vern. 554; Ib. 151, 370. Berrisford v. Milward, 2 Atk. 49.

(*q*) Evans v. Bicknell, 6 Ves. junr. 183. Martinez v. Cooper, 2 Russ.

198. Hunt v. Elmes, 30 L. J., Ch. 255. Dowle v. Saunders, 34 L. J., Ch. 87.

(*r*) *Ex parte* Knott, 11 Ves. 619.

the first mortgagee was not entitled to the costs of the suit for foreclosure after the tender. (s) But it must be clearly shown that the whole amount which the first mortgagee is entitled to charge upon the land is tendered to him. (t) After a first mortgage has been paid off, the second mortgagee may file a bill to have the legal estate conveyed to him without praying to foreclose the mortgage; and he may, it seems, do this at the peril of costs until the day of payment under a decree for redemption obtained against him by the mortgagor. (u) Upon a question of priority of incumbrances on shares, notice to one or more members of a joint-stock company individually is not notice to the company at large. (x)

1041. *Where the owner of land deposits his title-deeds with a creditor as a security for the payment of a debt*, the creditor has in equity a claim or charge upon the estate, which will bind the land in the hands of all subsequent purchasers who had notice of the deposit at the time they accepted a conveyance of the property, and will prevail over the claims of all prior unexecuted or subsequent judgment creditors, (y) and of the trustee of a bankrupt depositor. (z) The depositary of the title-deeds has a direct control over the owner's power of disposition of the estate, inasmuch as a purchaser can not safely take a conveyance without a previous investigation of the title; and, if the latter receives notice of the deposit of the deeds before he has completed his purchase, the land will be subjected in his hands to all the

(s) *Smith v. Green*, 1 Col. Ch. C. 555.

(t) *Williams v. Owen*, 13 Sim. 597.

(u) *Grugcon v. Gerrard*, 4 Y. & C. 119.

(x) *Martin v. Sedgwick*, 9 Beav. 333.

(y) *Whitworth v. Gaugain*, 3 Hare. 416. 27 & 28 Vict. c. 112.

(z) *Sumpter v. Cooper*, 2 B. & Ad. 223. *Doe v. Jones*, 10 B. & C. 718.

claims and charges which the depositary of the deeds may have acquired thereon. (a) If, however, a subsequent purchaser or mortgagee has been deceived by false evidence of title, such as the production of forged or counterfeit title-deeds, and has not been guilty of any laches or negligence in the course of his purchase or acquisition of the property, he will be entitled to hold it discharged of the lien. (b) In such a case, the equities of the parties being equal, the possessor of the legal title must prevail. So, if the depositary of the deeds makes himself in any way a party to the concealment of the deposit from a subsequent purchaser or mortgagee, he will lose his lien upon the land as soon as a transfer or conveyance has been executed to the latter. If he is induced to part with the possession of the deeds, and they are then taken without his knowledge or authority, and produced as evidence of title to an intended purchaser, who accepts a conveyance and pays his purchase-money in ignorance of the deposit, the land will pass free from the charge. (c) But the depositary will not, from the mere circumstance of his having parted with the possession of the deeds, and without their having been made the instrument of fraud, lose his charge or lien upon the land therein comprised. (d) If the property comprised in the title-deeds is subject to a trust, the trust will prevail as against the depositary, although he had no notice of the trust at the time of the making of the deposit. (e) A lien may be created on the estate and interest of the depositor by the deposit of a land certificate.

(a) *Hiern v. Mill*, 13 Ves. 114.
Birch v. Ellames, 2 Anstr. 427.
Dryden v. Frost, 3 My. & Cr. 670.
See Vendor and Purchaser Act, cited
ante, § 1045.

(b) *Plumb v. Fluit*, 2 Anstr. 432.
(c) *Allen v. Knight*, 5 Hare, 278.
(d) *Ex parte Morgan*, 12 Ves. 6.
(e) *Manningford v. Toleman*, 1 Col
C. C. 670.

granted in conformity with the 25 & 26 Vict. c. 53. (*f*)¹

1042. Authentication of the deposit as a charge on realty.—In order to constitute and create a charge or lien of this description upon the land, there must be an actual or constructive deposit of the title-deeds; (*g*) an agreement to make a deposit will not have the effect of charging the land with the payment of the debt. But it is not necessary that there should be a written memorandum of the nature and terms of the deposit. (*h*) If money is advanced on the one side, and the deeds are deposited on the other, or the depositor is shown to have been indebted to the depositary at the time of the making of the deposit, it is sufficient to constitute and create the charge or lien upon the land. (*i*) But the mere production of title-deeds from the possession of a bond creditor is not of itself sufficient evidence of a lien. (*k*) A charge upon copyholds may be created by “a mere deposit by a debtor of the copy of court roll with his creditor,” as a security for the payment of the debt. (*l*) An actual charge or lien by deposit of title-deeds is not within the Statute of Frauds; (*m*) but it is otherwise with an agreement to make a deposit, which is not binding unless it is in writing. (*n*) An oral agreement to mortgage lands as a security for the payment of an existing debt, followed by a deposit of title-deeds, has been held to have the

(*f*) See sect. 73.

(*k*) *Chapman v. Chapman*, 20 L.

(*g*) *Ex parte Coombe*, 4 Mad. 249.

J., Ch. 465. *Ex parte Hooper*, 19 Ves. 177.

Ex parte Perry, 3 M. D. & G. 252.

Daw v. Terrell, 33 Beav. 218.

(*l*) *Whitbread v. Bulnois*, 1 Y. & Col. 303.

(*h*) *Shaw v. Foster*, L. R., 5 H. L.

Cas. 321.

(*m*) *Russel v. Russel*, 1 Bro. C. C. 269.

(*i*) *Ex parte Langston*, 17 Ves. 230.

Ex parte Kensington, 2 Ves. & B. 83.

(*n*) *Ex parte Coombe*, 4 Mad

Richards v. Borrett, 3 Esp. 102.

249.

¹ See *ante*, vol. ii., note 1, p. 32.

effect of hypothecating or charging the lands held under such deeds. (o) Title-deeds originally deposited in the hands of bankers for safe custody may, by a subsequent agreement with them, be changed into a deposit to secure the repayment of money advanced; (p) and, if changes take place in the members of the banking firm, they will not, by reason thereof, lose the benefit of their security. (q) Where some brewers agreed to advance money to a publican on a deposit of his lease, and the lease was delivered by the lessor immediately after its execution, to the brewers' agent, who advanced the money, it was held that the brewers had a lien on the lease. (r) Lastly, it may be observed that, although a written contract is held not to be necessary to establish the charge or lien upon the land, yet, if the depositary can produce no written evidence of the contract, he will not in general be allowed the costs of any proceedings undertaken by him to enforce his lien. (s)

1043. *Of the parties entitled to make the deposit.*—The deposit must be made by the person who has the ownership of, and power of disposition over, the property comprised in the deeds, and with the apparent intention of pledging the title as a security for the payment of money. A person who has casually become possessed of title-deeds, or who has received them from a person who had no authority from the owner to pledge them, can not, of course, found any lien or charge upon the deposit. The depositary, moreover, must have

(o) *Edge v. Worthington*, 1 Cox, 211. *Ex parte Bruce*, 1 Rose, 374. *Ex parte Harvey*, Mont. & Chitt. 261.
 (p) *Ex parte Farley*, 5 Jur. 512.
 (q) *Ex parte Smith*, 2 Mon. D. & De G. 314. *Ex parte Oakes*, Ib. 234.
 (r) *Meux v Smith*, 2 Ib. 789; 1 Ib. 396.
 (s) *Ex parte Brightens*, 1 Swanst 3. *Ex parte Trew*, 3 Mad. 372. *Ex parte Moss*, 3 De G. & S 599.

all the deeds which are essential to the establishment of the title. If he has only a portion of the title-deeds, and is possessed only of insufficient and incomplete evidence of title, he can not found thereon a lien or charge upon the land as against subsequent purchasers and mortgagees; and, if part of the title-deeds are deposited with one creditor, and part with another creditor, neither of them will obtain a lien by the deposit. (*t*) The depositor of the deeds can, of course, only charge the lands to the extent of his own estate and interest therein. If a tenant for life deposits the title-deeds of the inheritance with his creditor, the estate for life only is charged, and the depositary has no lien against the remainder-man; and, if a vendor retains the title-deeds, and pledges them, he can confer a security only to the extent of his own lien upon them. (*u*) If the depositor has no interest at all in the deeds, he can confer none on his depositary. (*x*)

1044. *Of the extent of the lien.*—The lien extends in general, in the absence of an express agreement to the contrary, to all the property comprised in the deeds, and embraces the entire estate and interest of the depositor. (*y*) Where the memorandum of the deposit of the conveyance of a house and furniture stated, “Herewith I hand you the title-deeds of my Bognor estate as collateral security,” it was held that the furniture was excluded, the words “my Bognor estate” having reference only to the house and land. (*z*) But, where the lease of a dwelling-house was deposited, it was held that the tenant’s fixtures in the

(*t*) *Ex parte* Wetherell, 11 Ves. 398. *Ex parte* Pearce, 1 Buck, 525. But see *Ex parte* Chippendale, 1 Deac. 67; 2 Mont. & A. 299.

(*u*) Hooper v. Ramsbottom, 6 Taunt. 12.

(*x*) Jackson v. Butler, 2 Atk. 306. Harrington v. Price, 3 B. & Ad. 170.

(*y*) Ashton v. Dalton, 2 Col. Ch. C. 565.

(*z*) *Ex parte* Hunt, 1 Mon. D. & De G. 139; 4 Jur. 342.

dwelling-house were included in the lien, although they were not mentioned in the written memorandum accompanying the deposit. (a) If deeds are deposited for the purpose of obtaining credit, the depositary has no lien upon them in respect of moneys previously advanced. (b) Where the purchaser of an equity of redemption in premises subject to a mortgage term, deposited the purchase-deed as a security for a loan, and afterwards paid off the mortgage and took a surrender of the term and became bankrupt, it was held that the lien created by the deposit extended to the whole estate, freed from incumbrance. (c) If it is stipulated, at the time of the making of the deposit, that the deeds are to be returned whenever the debt is reduced to a certain amount, there will be no lien or charge upon the land so long as the debt is kept below that amount; but, whenever the debt exceeds the sum named, the lien arises, and covers the whole amount due. The lien will extend to subsequent advances, if that appears, by the terms of the original contract, or by subsequent agreement, to have been the understanding and intention of the parties. (d) Where the deposit was accompanied by a written agreement securing a specific sum, it was held that the security might be extended to further advances by a subsequent oral contract. (e) Such further liens, founded on further advances, may be created in favor of third parties; but they ought to be evidenced by writing. (f)

(a) *Ex parte* Cowell, 12 Jur. 411.(b) *Mountford v. Scott*, 1 Turn. & Russ. 274.(c) *Ex parte* Bisdec, 1 Mon. D. & De G. 333.(d) *Ex parte* Linden, 1 Mon. D. & De G. 428. *Ex parte* Farley, ib. 683. *Ex parte* Kensington, 2 Ves. & B. 79.*Ex parte* Hooper, 19 Ves. 477. *Ex parte* Alexander, 1 Glyn. & J. 409. *Ex parte* Langston, 17 Ves. 227.(e) *Ex parte* Nettleship, 2 Mon. D. & De G. 124.(f) *Ex parte* Whitbread, 19 Ves. 209. *Factor v. Philpot*, 12 Pr. 197.

1045. *Of the depositary's right to have the estate sold.*—If the debt or the money, to secure the due payment of which the deposit has been made, is not paid by the time appointed, the depositary may obtain a decree from the court for a sale of the property, and an appropriation of the produce of the sale in satisfaction and discharge of the amount due, six months being allowed the depositor to redeem the property. (*g*) The court, in this respect, follows the civil and continental law, where it is said to be the natural effect of an hypothecation “that, if the debtor does not pay, the creditor may sell, and obtain payment out of the price or marketable value of the thing hypothecated.” The debtor may at any time after the time limited for the payment of the debt has expired, and before the lands have been sold by the decree of the court, release the land, and obtain an extinguishment of the charge, by paying or tendering to the depositary the amount of the debt, unless, indeed, the deeds have been deposited under an agreement requiring notice to be given of the debtor's intention to redeem the charge, or imposing certain conditions which have not been complied with. A charge or lien resulting from a deposit of title-deeds is an assignable interest, and may be bought and sold. (*h*)

In the Roman law, if the debt was not paid at the time appointed, the creditor had a right to sell the property without the authority or intervention of any court of justice, provided he duly complied with the following conditions. If the contract of hypothecation gave him an express authority to take possession of the hypothecated property, and appropriate it to his

(*g*) *Pain v. Smith*, 2 Myl. & K. 417. (*h*) *Hobson v. Mellond*, 2 M & Rob. 342.
Lewis v. John, 1 Coop. Ch. Pr. 10.

use in case of the debtor's default, he might at once seize and sell it. If no such power was given him, he was bound to give notice to the debtor of his intention to sell two years before any sale could take place, and the debtor had, during all that time the power of redeeming the charge. If he failed so to do, the creditor was, in contemplation of law, the authorized agent of the debtor for the purposes of the sale, and could transfer the right of property and possession of the thing hypothecated to the purchaser by his contract, just the same as any other agent fully authorized by the owner of property to effect a sale thereof on his behalf. Having received the purchase-money, he was at liberty to take therefrom the amount of the charge or debt, and was responsible to the debtor for the surplus. If, on the other hand, the purchase-money was insufficient to discharge such debt, the debtor continued responsible for the deficiency.

1046. *Liens on estates for unpaid purchase-money* arise wherever a vendor delivers possession of an estate to a purchaser without receiving payment of the price. (i) The lien binds the land in the hands of the purchaser, his heirs, and devisees, and all subsequent bona fide purchasers with notice. (k) But it will not prevail against a bona fide purchaser without notice who has obtained a conveyance of the legal estate. The mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him with notice; for that does not show that the money was not paid. (l) A person who sells an equitable life interest in lands in consideration of the payment of an annuity has a lien upon the land for the

(i) Sugd. Vend. & Purch. 856, 857, 329. Elliott v. Edwards, 3 B. & P. ed. 1846. 181.

(k) Mackreth v. Symmons, 15 Ves. (l) Sugd. Vend. 879.

annuity as against the purchaser. (*m*) Where lands were sold, and it was agreed that the purchase-money should remain unpaid, and be a charge thereon, and advances were made by the vendor to the purchasers to enable them to build, it was held that the vendor's lien extended to these advances. (*n*) A charge or lien of this description upon a newly-purchased estate is termed, by the French jurists, a tacit hypothecation. (*o*) It does not appear to have been known to the Roman law. The party entitled to the lien may, under certain circumstances, obtain from the court a decree for the re-sale of the property, and an appropriation of the produce of the sale, in liquidation and discharge of the debt. (*p*)

The owner of land taken by a railway company is entitled to a lien upon the land so taken for the amount both of the purchase-money and of the compensation for severance, (*q*) and has the same remedies for enforcing it as an ordinary vendor, although the railway company have entered and used the land for the purpose of their railway. (*r*) If land is to be paid for by installments, every payment is a part performance of the contract by the vendee, and transfers to him a corresponding portion of the estate. (*s*)

1047. *Priority of liens.*—As between two persons whose liens are of the same nature and quality and

(*m*) *Matthews v. Bowler*, 16 L. J., s. 1
Ch. 239.

(*n*) *Ex parte Linden*, 1 Mon. D. &
De G. 428.

(*o*) Tel est enfin celle que le vendeur d'un heritage a sur cet heritage, pour le prix qui lui est du. Les lois romaines ne donnaient point cette hypothèque au vendeur; elle est de notre droit. Pothier, Hypoth. ch. 1,

(*p*) *Rome v. Young*, 3 Y & C. 199.

(*q*) *Walker v. Ware, &c., Railway Company*, 35 L. J., Ch. 94.

(*r*) *Wing v. Tottenham & Hampstead Junction Ry. Co., L. R.*, 3 Ch 740. *Munns v. Isle of Wight Ry. Co., L. R.*, 5 Ch. 414; 39 L. J., Ch. 522.

(*s*) *Rose v. Watson*, 10 H. L. C. 672.

precisely equal, the possession of the deeds gives the priority. But, if possession of the deeds has been lost by one incumbrancer and gained by another in consequence of the perpetration of a fraud, possession of the deeds will confer no priority on the holder, although he got them bona fide and without any knowledge of the fraud. (t) When the equities of the two parties are in all respects precisely equal, the maxim "qui prior est tempore potior est jure" will prevail. But when there are several incumbrancers, and one of them, though subsequent in date, has by his greater diligence got in aid of his incumbrance a legal right, the court will give him priority. (u) Whether the lien of a vendor for unpaid purchase-money, or that of a subsequent incumbrancer, ought to be preferred, must depend upon all the circumstances of each particular case, and upon the conduct of the respective parties; and among the circumstances which may give to the one the better equity, the possession of the title-deeds is a very material one. If the unpaid vendor, after executing a conveyance in the usual form acknowledging the receipt of the purchase-money, imprudently delivers to the purchaser the possession of the title-deeds, he arms the latter with the means of dealing with the estate as the absolute owner, and of committing a fraud; and, if the purchaser raises money upon the credit of a deposit of the deeds, the equity of the depositary of the deeds will prevail over that of the unpaid vendor. (x) To be safe, therefore, from the claim of a subsequent incumbrancer or mortgagee, the unpaid vendor must keep the possession of all the title-

(t) *Ex parte Reid*, 12 Jur. 533.(x) *Rice v. Rice*, 23 L. J., Ch. 292(u) *Bates v. Brothers*, 23 L. J., Ch. *Roberts v. Croft*, 27 L. J., Ch. 220.

deeds, and especially of his own conveyance to the purchaser. (*y*)

1048. *Of rent-charges on lands and tenements.*—The grant of a sum of money, to issue out of the land of the grantor, and to be paid at fixed consecutive periods for a term of years, for life or in fee, accompanied by a power of distress, creates a charge or lien upon the land, which binds the land in the hands of all subsequent purchasers and mortgagees, and descends with it to the heir-at-law. Whenever a rent-charge can be distrained for, the liability to a distress follows the land into the hands of all persons claiming under or through the grantor of the rent. (*z*) A general grant of rent to a man without limitation of time will amount to a grant for the life of the grantee, if the grantor himself is seized in fee or his estate lasts sufficiently long. (*a*) If a lessee for term of years grants a rent, to be issuing out of the land so held by him, for the life of the grantee, the grant is void as a rent-charge or annuity for life ; but it will enure as a grant of a rent for the term and interest possessed by the grantor in the land, provided the grantee shall so long live. (*b*) All owners of land of full age and under no incapacity may charge their lands with a rent-charge to the full extent of their several interests in the land, but have of course, no power to charge it to a greater extent. The grant is in all cases good, as against the grantor himself, and those who claim through or under him, although it may be void and of no effect as against persons claiming by title paramount. A rent-charge, being in the nature of an incorporeal right, can only be granted or conveyed by deed or will. The proper

(*y*) *Worthington v. Morgan*, 18 L. J., Ch. 233.

(*a*) *Perk. Grants*, s. 104.

(*b*) *St. Auby's case*, *Cro. Eliz.* 183.

(*z*) *Co. Litt.* 162, b. ; 144 a.

mode of creation is by a deed of grant, whereby the grantor grants the rent to be issuing out of certain land, with a power of distress to the grantee for the recovery thereof. No precise form of words is necessary to create the charge, nor need the word "grant" be used in the deed; (c) but there must be equivalent words, manifesting the plain intention of the parties to make a positive and immediate grant. (d)

1049. *The acts for the registration of rent-charges and annuities* (e) do not extend to rent-charges or annuities granted for a fixed term of years or in perpetuity, or to bonds to secure the payment of pre-existing debts by installments, or to any payments which are not strictly grants of annuities. (f) It has been held that, if a purchaser knows at the time he purchases the land and accepts a conveyance thereof, of the existence of a rent-charge, the land shall remain liable thereto in his hands, although the charge was never registered; "for, where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience, and the statute was never intended to relieve such a person." (g)

1050. *Of the power of distress, entry, and sale.*—A grant of a rent to a person who had no reversionary estate in the land out of which the rent issued unaccompanied by a power of distress, did not by the common law charge the land with the rent; and the grantee had no right to distrain for it. It was accordingly called a "rent seck" or dry rent. Now, however, by the 4 Geo. 2, c. 28, s. 5, it is enacted that all persons, bodies politic and corporate, shall have the

(c) Co. Litt. 147, a. 2 Rolle Abr. 14.
 424. Litt. sec. 221. (f) Marriage v. Marriage, 1 C. B. 776.
 (d) *In re Locke*, 2 D. & R. 605.
 (e) 18 & 19 Vict. c. 15, ss. 12, 13, (g) Cheval v. Nichols, 1 Str. 664.

like remedy by distress in the case of rents seck, rents of assize, and chief rents, as in the case of rent reserved upon lease. If a lessee for years assigns his term, reserving a rent, such rent is not a rent seck within the meaning of the statute, and can not therefore be distrained for, unless an express power of distress has been reserved or granted in the deed of assignment; but an action must be brought upon the contract for the recovery of the arrears. (*h*) "There are two ways of creating a rent: the owner of the land either grants a rent out of it, or grants the land and reserves the rent; there is no such thing as a rent service, rent seck, or rent charge, issuing out of a term of years." (*i*) In creating a rent, therefore, for life or years, or for years determinable on a life or lives, to be issuing out of a chattel interest, a power of distress is absolutely necessary to charge the land, and enable the grantee and his assignees to distrain, unless the grantee or assignee has the reversion of the lands.

It is said, moreover, that, if the grantee was never seized of the rent, he can not distrain for it at all; and, as a seisin can not be had of a chattel interest, but only a possession, an express power of distress ought to be given on creating a rent for years to be issuing out of a freehold estate. (*k*) In addition to the power of distress, a power is frequently given to the grantee of a rent-charge, and to his assignees, to enter upon the lands charged in case of non-payment of the rent within a certain number of days, and hold possession of them, and receive the rents and profits, until he has satisfied the arrears due. In this case the grantee or

(*h*) Bro. Abr. Dette, pl. 32. Parmenter v. Webber, 8 Taunt. 593.

(*i*) Per Cur., — v. Cooper, 2 Wils.

(*k*) Litt. sec. 217, 341. 18 Vin.

Abr. 474, C. Dixon v. Harrison Vaugh. 49. Gilb. 38.

his assignee has a right of entry, if the rent remains unpaid after the time limited, and may maintain an action for the recovery of possession of the land. (*l*) But this right of entry does not extend to copyhold estates. (*m*) When a rent-charge has remained in arrear and unpaid for a considerable period, the court has sometimes, under certain circumstances, ordered the property to be sold, and the purchase-money to be applied in payment of the arrears. (*n*)

1051. *Extinguishment of rent-charges.*—"If a man hath a rent-charge to him and to his heires issuing out of certaine land, if he purchase any parcel of this to him and his heires, all the rent-charge is extinct, and the annuitie also, because the rent-charge can not by such manner be apportioned." And so, if he brings a writ of annuity and charges the person of the grantor, the land is thenceforth discharged, and the contract becomes a mere personal contract. (*o*)

1052. *Lands and tenements might formerly have been hypothecated by a registered judgment.* Thus, where a debtor, by a cognovit or warrant of attorney, authorizes his creditor, under certain circumstances or upon a certain contingency, to sign a judgment against him for the amount of the debt, it becomes a judgment debt, and, when registered, was formerly binding upon all the lands of the debtor, as well after-acquired as those of which he was possessed at the time of the registration of the judgment; (*p*) but the Law of Property Act (23 & 24 Vict. c. 38), s. 1, enacted that no judgment should affect land, of what-

(*l*) *Haverhill v. Hare*, Cro. Jac. 510.
Litt. sec. 327. *Jemott v. Cowley*, 1
Wms. Saund. 112, c. *Doe v. Lord*
Kensington, 8 Q. B. 429.

(*m*) *Gilb. Ten.* 181-185.

(*n*) *Cubit v. Jackson*, M'Clel. 495.

Ex parte Price, 3 Mad. 132. *White*
v. James, 26 Beav. 191; 28 L. J., Ch
179.

(*o*) Litt. sec. 222.

(*p*) *Cuthbert v. Dobbin*, 1 C. B
278. 1 & 2 Vict. c. 110.

ever tenure, as to a purchaser or mortgagee, notwithstanding notice, until a writ of execution had been issued and registered; and the 27 & 28 Vict. c. 112, enacts (s. 1) that no judgment, statute or recognizance entered up after the passing of the Act shall affect any land, whatever be the tenure, until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, &c. And every writ or other process of execution of any such judgment, &c., by virtue whereof land shall have been delivered in execution, shall be registered in the manner provided by the 23 & 24 Vict. c. 38, but in the name of the debtor against whom such process is issued. Provision is made (s. 4) for the sale of lands delivered in execution, and for the application of the proceeds of the sale.

1053. *Warrants of attorney, cognovits, and orders for judgment.*—Warrants of attorney to confess judgment and cognovits must be executed in the presence of and attested by an attorney on behalf of the person giving them; (*q*) and the documents themselves or true copies of them must be filed, as required by the 3 Geo. 4, c. 39, within twenty-one days after execution, or they will be deemed to be fraudulent and void. If the warrant or cognovit is subject to any defeazance or condition, such defeazance or condition must be written on the same paper or parchment with the warrant or cognovit before it is filed, or the warrant or cognovit will be void. (*r*) A warrant of attorney with judgment entered up, and execution issued thereon, and bill of sale by the sheriff to the judgment-creditor, has been held to be an assignment of property to such

(*q*) 32 & 33 Vict. c. 62, s. 24, 25.

(*r*) 32 & 33 Vict. c. 62, s. 26.

judgment-creditor by the giver of the warrant of attorney. (s) Judges' orders for judgment made by consent, or a copy thereof, if the action is in any other court than the Queen's Bench, must, with an affidavit of the time when such consent was given, and of the residence and occupation of the defendant, be filed in the Queen's Bench within twenty-one days after the making of the order; and the 3 Geo. 4, c. 39, and the 6 & 7 Vict. c. 66, are made applicable to such orders. (t)

1054. *Charges on lands by statute merchant, statute staple, and recognizance*, when enrolled and certified, pursuant to the 29 Car. 2, c. 3, s. 18, and the 8 Geo. 1, c. 25, and executed pursuant to the 27 & 28 Vict. c. 112, bind the lands and tenements of the debtor in the hands of all subsequent purchasers and mortgagees. (x) If the debt is not paid at the time appointed, execution may at once be awarded, without any mesne process to summon the debtor, or production of evidence to convict him, and all the lands to which the debtor is then entitled may be taken and delivered to the creditor, who will be entitled to hold them until the debt and costs are satisfied out of the rents and profits.

SECTION III.

MORTGAGE, ETC., OF CHATTELS.

1055. *Mortgages of goods and chattels.*—If goods and chattels are bargained and sold, or granted, or assigned by one man to another upon the terms that

(s) Doe v. Carter, 8 T. R. 300.

(x) Ellis v. Reg., 8 Exch. 925.

(t) 32 & 33 Vict. c. 62, s. 27.

the sale or transfer is to be void on the payment of a sum of money at an appointed period, and that the vendor or transferror, is in the meantime, and until default has been made in payment of the money, to have the possession and use of the things so sold granted, or assigned, the contract is a contract of mortgage. If the possession only is transferred, the right of property continuing in the transferror, the contract is a contract of pledge.

A mortgage of goods and chattels may be made by simple contract (*y*) as well as by deed. If, by the terms of a bill of sale or assignment of chattels by way of mortgage, the mortgagor is to hold and enjoy the chattels as the mere servant or agent of the mortgagee, or at the will of the mortgagee, the latter is entitled to the possession of them whenever he thinks fit to call for it, and may seize and carry away and sell the property. (*z*) If the mortgage-debt is to be paid on demand, and the mortgagor is to possess the mortgaged property until default has been made in payment, the mortgagee has no right of possession, until demand has been made. (*a*) If the mortgage-debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired, and, if he takes possession, he will subject himself to an action. (*b*) But, if the mortgagor deals fraudulently with the mortgaged goods thus left in his possession,

(*y*) *Flory v. Denny*, 7 Exch. 585 ; 351.

21 L. J., Ex. 223. *Maugham v.*

Sharpe, 34 L. J., C. P. 19.

(*z*) *Mayhew v. Suttle*, 4 Ell. & Bl.

(*a*) *Bradley v. Copley*, 1 C. B. 697.

(*b*) *Brierly v. Kendall*, 17 Q. B.

937 ; 21 L. J., Q. B. 161.

as if he attempts to sell them, the bailment is determined, the possessory title reverts to the mortgagee and he may immediately commence an action for the recovery of the goods or their value. (c)

If goods are assigned to the mortgagee upon trust to permit the mortgagor to hold and enjoy them until default has been made in payment of the mortgage-debt and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagee has the legal right of possession incumbered with the trust as well as the right of property, and may maintain an action against any one who wrongfully converts them to his own use. (d) A proviso in a mortgage of chattels that, after default made in payment of the mortgage-debt after notice, it shall be lawful for the mortgagee to receive and take into possession, and thenceforth to hold and enjoy, the mortgaged chattels, and to sell and dispose of them, and that, until default, it shall be lawful for the mortgagor to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee. The latter is the legal owner, whether in or out of possession. (e)

A mortgage of goods and chattels and movables (excepting ships) will, in general, be found to be a doubtful and inadequate security for the payment of money; for, as the mortgagor is left in the possession of the goods, and continues the apparent owner of them, he will be able to defeat the title of the mortgagee in a variety of ways. He may sell the goods in market overt to a *bonâ fide* purchaser, without no

(c) *Fenn v. Bittleston*, 7 Exch. 152;
12 L. J., Ex. 41.

(d) *White v. Morris*, 11 C. B. 1015;
21 L. J., C. P. 185.

(e) *Gale v. Burnell*, 7 Q. B. 850.

tice of the mortgage, and so divest the mortgagee of his right of property in them, and deprive him of his security ; and, if the mortgagor becomes bankrupt, the chattels may become lost to the mortgagee by reason of their having been left in the possession of the mortgagor as reputed owner. (*f*)

1056. *What things pass by the grant of goods and chattels.*—If one give or grant to another all his “goods,” or all his “chattels,” by this do pass all his moveable and immoveable, personal and real, goods, horses, and other beasts, plate, jewels, and household stuff, bows, weapons, and such-like, and his money, and his corn growing in the ground, but not the term or interest in his dwelling-house, nor his leasehold estates, unless there be some term or provision in the deed manifesting an intention on the part of the grantor that his leasehold property should pass under the general description, (*g*) nor things which he hath in keeping for another ; nor choses in action, nor things of pleasure, such as hawks, hounds, &c. If one grant to another all his utensils, “hereby will pass all his household stuff, but not his plate, or jewels, or articles of trade.” And, “if two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all the goods they have in common, and likewise all the goods they have in severalty.”(*h*) But, if a schedule or inventory of the things purporting to be granted by the bill of sale is annexed thereto, nothing will pass under the bill of sale except the things specified in the inventory, (*i*) or comprehended under some

(*f*) *Shuttleworth v. Hernaman*, 1 De G. & J. 322. fying *Ringer v. Cann*, 3 M. & W. 343.

(*g*) *Harrison v. Blackburn*, 17 C. B., (*h*) *Shep. Touch.* 98.

N. S. 678 ; 34 L. J., C. P. 109, quali- (*i*) *Wood v. Rowcliffe*, 6 Exch. 407.

general description contained therein. (*k*) Evidence of surrounding circumstances is admissible to show what was intended to be bought and sold, and what is and what is not parcel of the subject-matter of the contract, and intended to pass thereby. (*l*) In order to transfer the right of property in goods and chattels by a deed of grant, or bill of sale, or other instrument of transfer, the chattel intended to be conveyed must be in existence, and be ascertained and identified at the time of the execution of the grant or transfer. If I grant a man twenty deer to be taken out of the herd in my park, no right of property in any particular deer passes to the grantee. "But, if I have a black deer amongst the other deer in my park, I can grant him, and the grant is good; or, if I have two that can be distinguished from the rest,* and I grant one or both of them, the grant is good for this, that it is certain what thing is granted." (*m*) A grant of fifty quarters of corn, twenty hogsheads of ale, or a dozen baskets of fruit, amounts only to a covenant to deliver goods answering the description given in the grant, and does not operate as an immediate transfer of any particular parcel of corn, or quantity of ale or fruit, unless the corn was measured, the ale put into hogsheads, and the fruit into baskets, and set apart so as to be ascertained and identified at the time of the execution of the grant.

1057. *Bills of sale of after-acquired property.*—A deed which professes to convey property not in existence at the time is, as a conveyance, void, simply because there is nothing to convey. So a contract

(*k*) *Cort v. Sagar*, 3 H. & N. 373; *Lunn v. Thornton*, 1 C. B. 379.
27 L. J., Ex. 378. *Gale v. Burnell*, 7 Q. B. 863. *Barr v.*

(*l*) *M'Donald v. Longbottom*, 28 L. J., Q. B. 293. *Gibson*, 3 M. & W. 390. *Perk.*

(*m*) *Brian*, C. J., 18 Ed. 4, 14. *GRANTS*, §§ 65, 90. *Robinson v. Macdonnell*, 5 M. & S. 228.

which purports to transfer property not in existence can not operate as an immediate alienation, simply because there is nothing to transfer ; but, if a vendor or mortgagor has agreed to sell or mortgage property real or personal, of which he was not possessed at the time of the making of the contract, and he receives the consideration for the contract, and afterwards becomes possessed of the property, and the property is of such a nature that specific performance would be decreed, the beneficial interest in the property is transferred to the purchaser or mortgagee as soon as the property is acquired. And the title of the grantee or assignee under the bill of sale will prevail, not only against a judgment creditor, but against a purchaser for value of the specific thing, unless he has fortified himself with actual possession without knowledge of the contract. (n) The right to growing crops and the growing produce of the soil, not sown or planted at the time of the making of the grant, may, as we have already seen, pass thereby. "The land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after; and the property shall pass as soon as the fruits are extant. A parson may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none ; but a man can not grant all the wool that shall grow upon his sheep that he shall buy hereafter ; for there he hath it neither actually nor potentially." (o)

A bill of sale of after-acquired property generally gives the grantee a power of seizing such property when it comes into existence ; (p) and, when the

(n) *Holroyd v. Marshall*, 33 L. J., J., Ch. 497.
 Ch. 193 ; 10 H. L. C. 214 ; over- (o) *Grantham v. Hawley*, Hob
 ruling *Holroyd v. Marshall*, 30 L. J., 132.
 Ch. 387. *Reeve v. Whitmore*, 32 L. (p) Per TINDAL, C. J., *Lunn v*

power or authority has been executed to the extent of taking possession of the after-acquired property by the grantee thereof, it is the same as if the grantor had himself put the grantee in actual possession of it. (*q*) Whether the debtor give possession by delivery with his own hands or direct the creditor to take it, the effect after actual possession by the creditor is the same; (*r*) and the authority may be extended to crops and property on after-taken land, as well as on land in the possession of the grantor at the time of the making of the grant. (*s*) But the power must be strictly executed. If, therefore, it is a power to distrain or seize after demand made, such demand should be made personally on the grantor, as it has been held that, if it is made on his wife in his absence, it is insufficient. (*t*) Where the bill of sale contained a proviso for redemption if the mortgagor should instantly on demand, and without delay on any pretense whatsoever, pay the amount, due, and that the demand might be made personally on the mortgagor, or by giving or leaving verbal or written notice to or for him at his place of business, &c., so, nevertheless, that a demand be in fact made and authorized the mortgagee, on default of payment to enter, seize, and sell, and in the mortgagor's absence from his place of business a demand was made there by the mortgagee upon his son, who stated his inability to meet it, and the mortgagee immediately seized, it was held that the notice required by the deed in the case of the mortgagor's absence was such.

Thornton, 1 C. B. 385. The taking of a bill of exchange is no suspension of this remedy. Bramwell v. Eglington, 33 L. J., Q. B. 130.

(*q*) Belding v. Read, 3 H. & C. 955; 34 L. J., Ex. 212.

(*r*) Congreve v. Evetts, 10 Exch. 308. Hope v. Hayley, 5 Ell. & Bl. 847. Holroyd v. Marshall, 30 L. J., Ch. 287; 33 Ib. 193.

(*s*) Carr v. Allatt, L. J., Ex. 385.

(*t*) Belding v. Read, *supra*. Toms v. Wilson, 4 B. & S. 442.

a notice as might be reasonably supposed to reach him, and to give him an opportunity of complying with it within a reasonable time, and that the seizure was, therefore, not justified. (*u*)

1058. *Bills of sale by judgment debtors and parties against whom execution has been issued.*—The right of the sheriff to seize property under a writ of execution formerly dated from the time of the delivery of the writ at the sheriff's office; but it has been enacted (*x*) that no writ of execution or attachment against the goods of a debtor shall prejudice the title to such goods acquired by any person bona fide, and for a valuable consideration, before the actual seizure (*y*) or attachment thereof by virtue of such writ, provided such person had not, at the time when he acquired such title, notice (*z*) that such writ, or any other writ by virtue of which the goods might be seized or attached, had been delivered to, and remained unexecuted in, the hands of the sheriff, under-sheriff, or coroner.

1059. *Registration of bills of sale of chattels.*—To prevent frauds on creditors by parties in possession of moveables and personal chattels which appear to be their own property, but which have been secretly mortgaged to grantees or holders of bills of sale who have the power of taking possession of such chattels to the exclusion of other creditors, it has been enacted (*a*) that every bill of sale of personal chattels made absolutely or conditionally, whereby the grantee or holder has power immediately, or at any future time, to seize or take possession of any property comprised

(*u*) *Massey v. Sladen*, L. R., 4 Ex. Ex. 203; 40 L. J., Ex. 154.
13; 38 L. J., Ex. 34.

(*z*) *Gladstone v. Padwick*, *supra*.

(*x*) 19 & 20 Vict. c. 97, s. 1.

(*a*) 17 & 18 Vict. c. 36, and 29 &

(*y*) *Gladstone v. Padwick*, L. R., 6 30 Vict. c. 96.

in such bill of sale, and every schedule or inventory thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of the making of such bill of sale, and of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, (b) be filed with the clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days from the making thereof, (c) in like manner as a warrant of attorney is required to be filed; otherwise such bill of sale shall be void as against assignees of the estate and effects of the person whose goods are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against sheriff's officers and persons seizing any property or effects comprised in such bill of sale in the execution of process authorizing the seizure of the goods of the person by whom such bill of sale shall have been made, so far as regards the property in, or the right to the possession of, any personal chattels comprised in such bill of sale, which, at the time of such bankruptcy, or insolvency, or assignment, or executing such process, and after the expiration of the said period of twenty-one days, shall be in the possession,

(b) *Attenborough v. Thompson*, 2 H. & N. 559. *Blackwell v. England*, 27 L. J., Q. B. 124. *Allen v. Thompson*, 25 L. J., Ex. 249. *Tuton v.*

Sanoner, 3 H. & N. 280. *Bath v. Sutton*, 27 L. J., Ex. 388.

(c) *Marples v. Hartley*, 30 L. J., Q. B. 92. *Banbury v. White*, 32 L. J. Ex. 259; 2 H. & C. 300.

or apparent possession, (*d*) of the person making such bill of sale, or as any person against whom the process shall have been issued under or in the execution of which such bill of sale shall have been given. (*e*)

When the bill of sale is made by way of mortgage, or if it is made or given subject to any defeazance, condition, or declaration of trust affecting its operation as between grantor and grantee, such defeazance, condition, or declaration of trust must be written on the same paper or parchment as that on which the bill of sale is written before it is filed ; otherwise such bill of sale will be null and void as against the same persons and as regards the same property, as if the bill of sale or copy had not been filed. (*f*) But, if the grantee under the bill of sale holds the property in trust for some third party who has advanced money upon the property included in it, such trust need not be declared on the face of the bill of sale. (*g*) These bills of sale, schedules, and inventories, or copies thereof, are to be numbered and entered in a book, and alphabetical lists are to be kept of the name, residence, and occupation of the parties to them, (*h*) the dates of the execution and filing, the sum for which each bill of sale has been given, and the time when it is made payable, (*i*) according to a form given in the schedule to the 29 & 30 Vict. c. 96 ; and all persons are at liberty to search the books, index, &c., and to take office copies and extracts. (*k*) If the debt for which the bill of sale has

(*d*) *Gough v. Everard*, 2 H. & C. 9 ; 32 L. J., Ex. 312. 17 & 18 Vict. c. 36, s. 7.

(*e*) *Pickard v. Bretz*, 5 H. & N. 9 ; 29 L. J., Ex. 18.

(*f*) 17 & 18 Vict. c. 36, s. 2.

(*g*) *Robinson v. Collingwood*, 17 C. B., N. S. 777 ; 34 L. J., C. P. 18.

(*h*) *Hatton v. English*, 7 Ell. & Bl. 94 ; 26 L. J., Q. B. 161.

(*i*) 17 & 18 Vict. c. 36, s. 3 ; 29 & 30 Vict. c. 96, s. 7.

(*k*) 29 & 30 Vict. c. 96, s. 8.

been given as security is satisfied or discharged, a memorandum of satisfaction may be endorsed on the registered bill of sale or copy. (*l*) The act does not extend to bills of sale of ships, or vessels, or shares thereof, made by way of mortgage as a security for a debt, and duly registered under the Merchant Shipping Act.

1060. *Renewal of registration.*—The registration of every bill of sale must be renewed every five years, or it will cease to be of any force. (*m*) The renewal is to be effected by some person filing in the office of the masters of the Court of Queen's Bench an affidavit stating the date of the bill of sales, and the names, residences, and occupations of the parties, and also the date of the registration of the bill of sale, and that it is still a subsisting security; and the masters are thereupon to number the affidavit and re-number the original bill of sale or copy filed in the office with a similar number.

1061. *What is a bill of sale of chattels within the meaning of the Bills of Sale Acts.*—Under the term "bill of sale" are included all assignments, transfers, declarations of trust without transfer, and assurances of personal chattels, growing crops, (*n*) and all powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt; but the following documents and instruments of transfer are expressly excluded from the operation of the statute; that is to say, assignments for the benefit of creditors of the person making the same; (*o*) marriage settlements not being post-nuptial settlements of personal prop-

(*l*) 17 & 18 Vict. c. 36, s. 6.

(*m*) 29 & 30 Vict. c. 96, s. 4.

(*n*) *Sheridan v. Macartney*, 5 Law T. R., N. S. 27, *ante*. But see *Gough*

v. Everard, 2 H. & C. 9; 32 L. J., Ex. 212.

(*o*) *General Furnishing, &c., Company v. Venn*, 2 H. & C. 153; 32 L. J., Ex. 220.

erty (*p*) transfers or assignments of any ship or vessel or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts or at sea; bills of lading, India warrants, warehouse-keeper's certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented. A receipt for the purchase-money of goods sold, not amounting on the face of it to a grant or transfer, is not a bill of sale within this section. (*q*) So also a contract by a builder that building materials brought on to the land for the purpose of erecting the buildings shall be considered as immediately attached to and belonging to the premises, is not within the operation of the statute, and does not need registration. (*r*)

1062. *What is an "apparent possession" of personal chattels.*—It is further enacted that personal chattels shall be deemed to be in the "apparent possession" of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house or mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that personal possession thereof (*s*) may have been taken by, or given to, any other person. (*t*)

(*p*) Such settlements must be registered for the protection of creditors. *Fowler v. Foster*, 28 L. J., Q. B. 210.

(*q*) *Hale v. Metropolitan Saloon Omnibus Company*, 4 Drew. 492; 28 J., Ch. 77. *Allsop v. Day*, 7 H. &

N. 457; 31 L. J., Ex. 105. *Byerley v. Prevost*, L. R., 6 C. P. 144.

(*r*) *Brown v. Bateman*, L. R., 2 C. P. 272.

(*s*) *Gough v. Everard*, 2 H. & C. 9; 32 L. J., Ex. 212.

(*t*) 17 & 18 Vict. c. 36, s. 7.

Where the assignee under a bill of sale of household furniture and effects immediately sent a person into the house to take and keep, and who took and kept, possession, but the assignor, down to the date of his bankruptcy, continuing to live in the house and use the furniture as before, it was held that the goods were in the apparent possession of the assignor. (*u*) But, where the grantor was tenant of rooms where the goods comprised in the bill of sale were placed, but resided elsewhere, and, having made default in paying the sum secured, he gave the keys of the rooms to the grantee, who opened them, and put his name on some of the goods, but did not remove them, it was held that the grantor did not occupy the rooms, and that the goods were not in his apparent possession. (*v*) Goods formerly seized by the sheriff under an execution remain in the apparent possession of the debtor. (*y*)

1063. *Requisites of the affidavit.*—The affidavit accompanying the bill of sale must set forth, first, the time of the making of the bill of sale; secondly, the residence of the parties and attesting witnesses; and, thirdly, their occupation. If the bill of sale itself clearly specifies all these particulars, and the affidavit refers to them as set forth in the bill of sale in such a way as to verify them on oath, the affidavit will be sufficient. (*z*) But, if it fails to do this, it will be insufficient. (*a*)

1064. *Description of the residence and occupation*

(*u*) *Ex parte* Hooman, *in re* Vining, L. R., 10 Eq. 63. *Ex parte* Lewis, *in re* Henderson, L. R., 6 Ch. 626.

(*v*) *Robinson v. Briggs*, L. R., 6 Ex. 1; 40 L. J., Ex. 17.

(*y*) *Mutton, ex parte*, L. R., 14 Eq. 178; 41 L. J., Bk. 57.

(*z*) *Routh v. Roublot*, 28 L. J., Q. B. 240. *Foulger v. Taylor*, 5 H. & N. 202.

(*a*) *Pickard v. Bretz, ante*

of the grantor.—An affidavit of the residence and occupation of the grantor to the best of the deponent's belief, is sufficient, if uncontradicted. (*b*) A trading company may give a bill of sale to secure a debt, although the power to do so is not expressly conferred by the articles of association; (*c*) and in such a case no statement of its residence or occupation need be given in the bill of sale or the affidavit, nor is it necessary to state the residences or occupations of directors who sign as such, and not as attesting witnesses. (*d*) The description must be as fits the grantor at the time of giving the bill of sale, not that of filing it. (*e*) The description of the residence of the grantor in the copy of the bill of sale may be referred to to explain and supplement the description given in the affidavit where that is insufficient. (*f*)

1065. *Description of the residence and occupation of the attesting witness.*—The attesting witness is properly described as residing at the place where he is employed or carries on his business. Thus a solicitor's clerk is properly described as residing at his master's office, where he attends all day; but he may also be described as residing at the place where he sleeps at night. (*g*) If the description is substantially correct, and parties could not have been misled by it, it will suffice. (*h*) Where a person has an occupation, the occupation must be correctly stated as a means of

(*b*) *Roe v. Bradshaw*, 4 H. & C. 178; L. R., 1 Ex. 106; 35 L. J., Exr 71.

(*c*) *Shears v. Jacob*, L. R., 1 C. P., 512; 35 L. J., C. P. 241.

(*d*) *Shears v. Jacob*, *supra*. *Deffell v. White*, 36 L. J., C. P. 25; L. R., 2 C. P. 144.

(*e*) *London and Westminster Loan*

Company v. Chace, 12 C. B., N. S. 730; 31 L. J., C. P. 314.

(*f*) *Jones v. Harris*, L. R., 7 Q. B. 157; 41 L. J., Q. B. 6.

(*g*) *Blackwell v. England*, 8 Ell. & Bl. 541.

(*h*) *Hewer v. Cox*, 30 L. J., Q. B. 73. *Briggs v. Boss*, L. R., 3 Q. B. 268; 37 L. J., Q. B. 101.

identification; (*i*) but the onus of proving that the party has an occupation lies on the person seeking to impeach the bill of sale. If the grantor of the bill of sale had no occupation at the time of the execution of the instrument, he may be described as having no occupation, (*k*) or as a "gentleman." (*l*) But if the party has any occupation at all, and is receiving remuneration for services of any sort or kind, his occupation must be correctly stated; and it will not do to describe him generally as a "gentleman," (*m*) or "esquire." (*n*)

1066. *Proof of the time of the making of the bill of sale.*—The Act of 1854 requires the bill of sale and the affidavit to be filed at the same time, so that the clerk is not justified in filing the one without the other; and therefore what certifies the time at which one was filed certifies also the time at which the other was filed. The books required to be kept under s. 3 are of such a public nature that a certified copy is admissible in evidence to prove the time of the filing of the bill of sale and the affidavit. (*o*)¹

(*i*) Allen v. Thompson, 1 H. & N. 19.

(*k*) Trousdale v. Shepperd, 14 Ir. C. L. R., 370 Q. B.

(*l*) Sutton v. Bath, 3 H. & N. 382. S. C., Bath v. Sutton, 27 L. J., Ex. 388. Morewood v. South York, &c., 3 H. & N. 800; 28 L. J., Ex. 114; Gray v. Jones, 14 C. B., N. S., 743.

(*m*) Beales v. Tennant, 29 L. J., Q. B. 188. Dryden v. Hope, 9 W. R.,

18. Adams v. Graham, 33 L. J., Q. B. 71. Brodrick v. Scale, L. R., 6 C. P. 98; 40 L. J., C. P. 130.

(*n*) Hooman, *ex parte*, L. R., 10 Eq. 63.

(*o*) Grindell v. Brendon, 28 L. J., C. P. 333; 6 C. B., N. S., 698.

¹ A chattel mortgage not recorded until after an attachment of the mortgaged property, was held invalid against the attaching creditor, there being unreasonable and unexplained delay in the recording. Pond v. Skidmore, 40 Conn. 213; and see Cunningham v. Tucker, 14 Fla. 251; Stockham v. Allard, 4 Thomp. & C. 128; 1 Hun, 566; Sidener v. Bible, 43 Ind. 230; Metcalf v. Fosdick, 23 Ohio St. 114; Crisp v. Miller 5 Heisk. 697; Hoyle v. Plattsburg, &c., R. R. Co., 154 N. Y. 314; Gould v. Marsh 4 Thomp. & C. 128; 1 Hun, 566.

1067. *Effect of registration.*—If the bill of sale is unstamped at the time of registration, the registration is nevertheless good, and the bill of sale is available on payment of the stamp duty and penalty. (*p*) The 17 and 18 Vict. c. 36, s. 1, only avoids unregistered bills of sale as against assignees and execution creditors; so that, if the owner of goods grants them to another by bill of sale, the grantee has a valid title as against all other persons. If, therefore, the owner of goods executes a bill of sale of them in favor of A, which is not registered, and subsequently grants and conveys the same goods by a second bill of sale to B, which is registered, B will have no title under the second bill of sale, as the grantor had previously parted with his property in the goods to A, and had nothing in them to convey to B. (*q*) But where a debtor made a bill of sale of his goods to S, which was not registered, and afterwards made another to H, which was registered, and execution having issued against him, both S and H claimed the goods which still remained in the debtor's possession, it was held that H was entitled to them, on the ground that the consequence of avoiding an unregistered bill of sale by execution is to displace it altogether. (*r*) Registration of a copy of a bill of sale is in no wise invalidated by the previous destruction of the original deed. (*s*)

1068. *Registration of assignments of bills of sale.*—When the execution is not against the assignor of a bill of sale, but against the original grantor, the non-registration of the assignment will not, it seems

(*p*) *Bellamy v. Saul*, 32 L. J., Q. B. 366.

(*q*) *Nicholson v. Cooper*, 3 H. & N. 384; 27 L. J., Ex. 593. *Stansfeld v. Cubitt*, 2 De G. & J. 227; 27 L. J.,

Ch. 266. *Badger v. Shaw*, 2 Ell. & Ell. 472; 29 L. J., Q. B. 77.

(*r*) *Richards v. James*, L. R., 2 Q. B. 285; 36 L. J., Q. B. 116.

(*s*) *Green v. Attenborough*, 3 H. & C. 468; 34 L. J., Ex. 88.

invalidate the title of the assignee ; for the Act says (s. 1) that the unregistered bill of sale shall be void as against sheriffs seizing in the execution of process authorizing the seizure of the goods of the person by whom the bill of sale has been given. This seems to confine the operation of the Act to those cases where the execution is issued against the grantor.

1069. *Registration of agreements for bills of sale.*—If an agreement to give a bill of sale is relied on as an equitable assignment, it must be registered. (*t*)

1070. *Priority of holders of bills of sale.*—A subsequent mortgagee does not acquire priority over another whose bill of sale was executed and registered first, by being the first to take actual possession of the property mortgaged. (*u*)

1071. *Evasion of registration.*—A practice has recently grown up of giving an unstamped bill of sale for a debt, and then, before the time for registration has arrived, renewing the bill, and so on, until at last a final bill is given which is duly stamped and registered. Upon each renewal the old bill is canceled and the original debt thus becomes the consideration for the new bill, and ultimately the last bill which is registered is good against the execution creditor. (*v*)

1072. *Mortgages void as against creditors.*—If a mortgagor of goods and chattels is largely indebted at the time of the execution of the mortgage, and the security is contrived for the purpose of protecting the mortgaged property from the grasp of the creditors of

(*t*) Mackay, *ex parte*, L. R., 8 Ch. 643. Cuming, *ex parte*, L. R., 16 Eq. 414.

(*u*) *Ex parte* Allen, *in re* Middleton, L. R., 11 Eq. 209.

(*v*) Smale v. Burr, L. R., 8 C. P. 64 ; 42 L. J., C. P. 20. *Ex parte* Harris, L. R., 8 Ch. 48 ; 42 L. J., Bk. 9.

the mortgagor, and not as a *bonâ fide* security for a debt, the mortgage will be invalid, and will not be allowed to prevail against the claims of creditors. If a bill of sale of chattels has been made by way of mortgage, and default has been made by the mortgagor in possession in payment of the mortgage-debt at the time appointed, so that the mortgagee has become complete owner, and has a present right of possession of the mortgaged property, and forbears to enforce his rights under the mortgage-deed for the purpose of shielding the debtor from his other creditors, and the mortgage is kept secret, and the mortgagor is allowed to obtain a delusive credit by reason of his possession and apparent ownership of the mortgaged property, this would be evidence of collusion between the mortgagor and mortgagee, and would tend to show that the mortgage-deed was not made *bonâ fide*, but was contrived "to disturb, hinder, delay, or defraud creditors."

1073. *Mortgages of stock-in-trade, constituting an act of bankruptcy.*—A mortgage, by a trader, of all his goods and chattels, stock-in-trade, and visible property, made for a pre-existing debt, has generally been considered an act of bankruptcy; for it enables the trader to continue his trade under a false appearance of a possession of stock, property and effects, and to gain a delusive credit, when he is in fact insolvent. (*y*) "Creditors," observes Lord MANSFIELD, "dealing with traders, whose apparent available personal property is thus mortgaged, are deceived by false appearances; and such mortgages are a fraud upon the whole bankrupt law, as they defeat the main object it has in view, viz., the equal distribution of the bankrupt's property

(*y*) Wood, *in re*, L. R., 7 Ch. 302; 41 L. J., Bk. 21.

and effects amongst his creditors, by securing to the mortgagee an unjust preference." (z) And it has been held that, although the mortgage-deed does not purport, upon the face of it, to convey all the trader's moveables and effects, yet, if it does, in fact, substantially convey all, and puts it in the power of the mortgagee to take possession at any time and sell, in default of payment of the mortgage-debt on demand, the conveyance constitutes an act of bankruptcy; (a) also, that, if there be a mere colorable exception of part, or the mortgage-deed conveys all but an insignificant portion of small value, it will, nevertheless, be an act of bankruptcy. (b) And it matters not that the deed was obtained under pressure, and was an unwilling act forced upon the bankrupt, or what were the circumstances under which it was obtained; it is enough that it enables the trader to carry on trade under the delusive appearance of being the owner of personal property, when he has not a single article unaffected by the mortgage-deed. (c)

"Every person," observes JERVIS, C. J., "must be taken to intend that which is the necessary consequence of his own act; and, if a trader makes a deed which has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent; and a deed which has that effect is a fraudulent deed within the terms of the Bankrupt Act." (d)

It has been held, however, that a bill of sale, by

(z) *Worsley v. De Mattos*, 1 Burr. 479. *Hale v. Allnutt*, 18 C. B. 505. *Reynolds v. Hall*, 4 H. & N. 519; 28 L. J., Ex. 257.

(a) *Lindon v. Sharpe*, 7 Sc. N. R. 730; 6 M. & Gr. 904. *Foxley, ex parte*, L. R., 3 Ch. 519.

(b) *Smith v. Cannan*, 2 Ell. & Bl. 35. *Siebert v. Spooner*, 1 M. & W. 719.

(c) *Ex parte Bailey*, 22 L. J., Bank. 45; 3 De G. M. & G. 534.

(d) *Graham v. Chapman*, 12 C. B. 103.

way of mortgage, to enable a trader to obtain pecuniary advances for the purpose of carrying on his trade, is not necessarily an act of bankruptcy, a fair equivalent being received by him for the mortgaged property; (e) but, if the equivalent does not consist of visible, tangible property unaffected by the mortgage-deed, and which can be made available for the payment of debts, it is, in truth, no equivalent, so far as the creditors are concerned, and does not prevent them from being hindered or delayed, or obviate the mischief which arises from the mortgagee having the power of suddenly withdrawing the whole of the personal property from the reach of the general creditors of the bankrupt. (f)

If such an assignment is an act of bankruptcy as being fraudulent against the creditors, it is also void as between the parties thereto. (g) If on a negotiation for a loan it is agreed that a certain sum shall be advanced, and that a bill of sale shall be given by the borrower when he is called upon, and the bill of sale is subsequently given, the assignment is not necessarily an act of bankruptcy. (h) And, if it be an act of bankruptcy, it is not void as against persons who were not creditors at the time of the execution of such bill of sale. (i)

1074. *Mortgaged chattels left in the possession and apparent ownership of a bankrupt mortgagor, by*

(e) Hutton v. Cruttwell, 1 Ell. & Bl. 20; 22 L. J., Q. B. 78. Bittlestone v. Cooke, 6 Ell. & Bl. 307. Harris v. Rickett, 4 H. & N. 6. Leake v. Young, 5 Ell. & Bl. 955. Mercer v. Paterson, L. R., 2 Ex. 309; 36 L. J., Ex. 218. Colemere, *in re*, L. R., 1 Ch. 132; 35 L. J., Bk. 8.

(f) *Ex parte* Sparrow, 2 De G. M. & G. 913. Woodhouse v. Murray, L.

R., 2 Q. B. 640; *Ib.* 4, Q. B. 27. Cohen, *ex parte*, L. R., 7 Ch. 20; 41 L. J., Bk. 17.

(g) Colemere, *in re*, *supra*.

(h) Harris v. Rickett, 4 H. & N. 1 28 L. J., Ex. 197. Hutton v. Cruttwell, 1 Ell. & Bl. 17. Morris v. Venables, 15 W. R. 2.

(i) Oswald v. Thompson, 2 Exch. 215; 17 L. J., Ex. 234.

the consent and permission of the true owner, (*k*) vest in the trustee ; (*l*) but a transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment duly registered, can not be invalidated. Where a newspaper was mortgaged, but the change of ownership was not registered at the Stamp Office and the mortgagee permitted the mortgagor to continue to print and publish the paper down to the time of his bankruptcy, it was held that he was not entitled to the benefit of his security as against the assignees of the bankrupt ; for, having permitted the bankrupt to continue the apparent owner of the property, the right to the paper passed to the assignees. (*m*) It has been held that, if one of two partners in trade, mortgages the plant, stock-in-trade debts, and profits, &c., to secure the repayment of a sum of money lent by the other, and the mortgagor is permitted to continue in possession of the things mortgaged, and to retain the management and visible ownership of them, the mortgage will be void as against creditors ; and, if the mortgagor shall become bankrupt, the trustee will be entitled to claim the mortgagor's share of the partnership effects discharged of the mortgage-debt. (*n*) But, if goods, which have been mortgaged by a trader before his bankruptcy are at the time of the bankruptcy in the hands of the sheriff under an execution against the bankrupt, they are not then, it seems, in his possession, order, or disposition, with the consent of the true owner. (*o*)

(*k*) *Ackraman v. Bates*, 29 L. J., Q. B. 78.

(*l*) 32 & 33 Vict. c. 71, ss. 15, 17.

(*m*) *Longman v. Tripp*, 2 B. & P. N. R. 67. *Foss, ex parte*, 2 De G. & J. 230.

(*n*) *Ryall v. Rowles*, 1 Ves. sen.

358. *West v. Skip*, Ib. 243. *Ex parte Stephenson*, 17 L. J., Bank. 5. *Ex parte Bell*, Ib. 9.

(*o*) *Fletcher v. Manning*, 12 M. & W. 581. *Foss, ex parte*, 2 De G. & J., 230.

Where a registered mortgagee of a ship, having deposited with a creditor the instrument of mortgage subsequently became bankrupt, it was held that such deposit took the ship out of the order and disposition of the bankrupt, and constituted the creditor an equitable mortgagee. (*p*)

1075. *Mortgage of machinery.*—Movable machinery placed in a mill or factory does not cease to be a personal chattel, if it is capable of being removed at any time without injury either to itself or to the building. And, if such machinery is left in the hands of a mortgagor who becomes bankrupt, it will be considered to be in his reputed ownership; (*q*) but, if the machinery is annexed to the freehold, and transferable therewith, it is not within the operation of the reputed ownership clause, which is confined to chattels personal, and does not extend to fixtures and things annexed to the freehold; so that, if the owner in fee of a manufactory or buildings containing fixtures, mortgages the buildings and fixtures, and is permitted to remain in possession of the mortgaged premises, and to carry on his trade there, and then becomes bankrupt, the fixtures annexed to the realty will not pass to the trustee, (*r*) although they have been mortgaged separately from the building in which they are contained. (*s*) If a mortgagor of chattels transfers them by bill of sale to another, and remains in possession of the mortgaged property, the registration of

(*p*) *Lacon v. Liffen*, 32 L. J., Ch. 25, 315; 4 Giff. 75.

(*q*) *Shuttleworth v. Hernaman*, 1 De G. & J. 322. *Waterfall v. Penistone*, 6 Ell. & Bl. 889; 26 L. J., Q. B. 100.

(*r*) *Horn v. Baker*, 9 East, 215. *Ex parte Lloyd*, 3 D. & C. 787. *Ex parte Wilson*, 4 Ib. 143. *Coombs v.*

Beaumont, 5 B. & Ad. 73. *Hubbard v. Bagshaw*, 4 Sim. 338. *Boydell v. M'Michael*, 1 C. M. & R. 177. *Walmsley v. Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97. *Barclay, ex parte*, 5 De G. M. & G. 403.

(*s*) *Whitmore v. Empson*, 23 Beav. 313; 26 L. J., Ch. 364; *sed quare*.

the bill of sale will not prevent them from being in his reputed ownership and passing to the assignees. (*t*)

1076. *Pledges of goods and chattels.*—We have already seen that, if the possession only of goods and chattels is transferred, the right of property continuing in the transferror, the contract is a contract of pledge.

1077. *Things which may be given in pledge.*—By the common law, all kinds of goods and chattels, title-deeds, and securities for money, promissory notes and bills of exchange, letters of allotment and scrip, certificates of shares, and even money itself when marked or inclosed in a bag, purse, or parcel, so as to be capable of identification, may be pledged. (*u*)

1078. *Parties entitled to pledge.*—One man can not, as a general rule, convey to another a power or right over property which he does not himself possess. If a servant takes his master's jewels and pledges them, the pledge can not alter or affect the ownership of them, or give the pledgee any right to detain them as against the owner. (*x*) But if a man obtains goods under color of a contract intended to transfer the property in the goods to him, and then pledges them, the pledgee will have a lien upon the goods to the amount of his advances. If, for example, a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange, or by a cheque on a banker where he has no funds, and then pledges the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien upon his ad-

(*t*) *Stansfield v. Cubitt*, 2 De G. & 223.

J. 227; 27 L. J., Ch. 266. *Badger v.* (*u*) *Isaack v. Clark*, 2 Bulstr. 306.

Shaw, 2 E. & E. 472; 29 L. J., Q. B. *Ross v. Moses*, 1 C. B. 232.

77. *Harding, ex parte*, L. R., 15 Eq. (*x*) 34 Hen. 6, fol. 25, pl. 33. *Har-*

top v. Hoare, 3 Atk. 44; 2 Str. 1187

¹ *Ante.*

vances against the vendor who has been defrauded : (*y*) but, if the property has not passed—if, for instance, the article has been stolen, or possession thereof has been obtained by false pretenses—and it has then been pledged, the pledgee will have no lien upon it as against the owner. If a person obtains possession of a delivery-order, dock warrant, or any documentary evidence of title to goods on the faith of a false and fraudulent representation, and obtains possession of the goods under the order, or gets them transferred into his name, or obtains warrants for their delivery to his order, and then pledges the goods or warrants, the pledgee will have no title to detain them as against the owner who has been defrauded. (*z*) If the pawnor has only a limited interest in the subject-matter of the pledge, he can only pawn to the extent of such interest, and, when that expires, the pawnee must surrender the pledge to the party who succeeds to the legal ownership. Therefore, where a quantity of plate was settled upon a widow for life, and she pawned it and then died, it was held that the pawnee had no right to detain the pledge as against the remainderman, although he had no notice of the widow's limited interest at the time he advanced the money. (*a*) If the vendor of an estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property of the title-deeds is so vested in the purchaser, that the vendor obtaining possession of them and pawning them confers on the pawnee no right to detain them after tender of the residue of the purchase-money. (*b*)

(*y*) *Parker v. Patrick*, 5 T. R. 175. 503.

White v. Garden, 10 C. B. 926; 20 L. J., C. P. 168.

(*a*) *Hoare v. Parker*, 2 T. R. 376.

(*b*) *Hooper v. Ramsbottom*, 6 Taunt.

(*z*) *Kingsford v. Merry*, 1 H. & N. 12.

1079. *Pledges by factors and agents intrusted with goods or documentary evidence of title to goods.*—

By the common law a factor had no right to pledge the goods of his principal, although he had a lien upon them for his advances to the latter, or for the general balance due to him on the accounts between them. Neither could he pledge the symbol of property in, or the documentary evidence of, the title to such goods, such as bills of lading, or orders or warrants for the delivery of goods. (c) To meet this inconvenience the 4 Geo. 4, c. 83, first gave to the pledgee the rights of the pledgor over the thing pledged; then came the 6 Geo. 4, c. 94, which gives certain powers of pledging to persons intrusted for the purpose of consignment or sale with goods or merchandise shipped in their own names. And then by the 5 & 6 Vict. c. 39, reciting the 4th section of this last-named statute, which enables agents intrusted with goods, (d) and persons to whom goods have been consigned to confer a good title on bonâ fide purchasers, who have bought and paid for the goods in the usual course of business without being aware of any want of authority on the part of the agent, it is declared that it is expedient that the same protection and validity should be extended to bonâ fide advances upon goods and merchandise as by the said recital Act is given to sales; and that owners, intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should, in all cases where such owners, by the said recited Act or otherwise, would be bound by a contract or agreement of sale be in like manner bound by any contract

(c) *Daubigny v. Duval*, 5 T. R. 604. (d) *Baines v. Swainson*, 32 L. J.,
Newson v. Thornton, 6 East, Q. B. 281.

or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof; and it is therefore enacted (s. 1), that any agent who shall be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien or security *bonâ fide* made by any person with such agent so intrusted, as well for any original loan, advance or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent. Also (s. 2) that, where any such contract for pledge, lien, or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandise, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien in respect of a previous advance by virtue of some contract made with such agent, such contract, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the meaning of the Act, and be as valid and effectual as if the consideration for the same had been a *bonâ fide* present advance of money; provided the lien acquired under such last-mentioned contract or agreement upon the goods or documents deposited in exchange shall not exceed the value, at the time, of the goods and merchandise, or the documents of title, or negoti

able security which shall be delivered up and exchanged.

But it is provided (s. 3), that the Act shall give validity to such contracts only, and protect only such loans, as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements has no authority to make the same, or is acting *mala fide* in respect thereof against the owner, and shall not protect any lien or pledge in respect of any antecedent debt (*e*) owing from any agent to any person with or to whom such lien or pledge shall be given, nor authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bonâ fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement shall be binding on the owner and all other persons interested in such goods.

Although, therefore, the owner of goods who intrusts them to a factor to sell, expressly prohibits the factor from pledging them, the prohibition will be of no avail against a pledgee who has received the goods in pledge from the factor, knowing that he was an agent for sale, but not knowing that he had been prohibited from pledging. You may, under this Act, treat any agent whom you know to be so as owner, in accepting any pledge of goods from him, although you know the goods have been intrusted to him to sell, provided you have not notice that the agent is acting *mala fide* and disobeying his instructions. (*f*) But, if the cir-

(*e*) *Jewan v. Whitworth*, L. R., 2 v. *Gorst*, L. R., 4 Eq. 315.
Eq. 692; 36 L. J., Ch. 127. Macnee (*f*) *Navulshaw v. Brownrigg*, 21

cumstances are such that a reasonable man of business applying his understanding to them would certainly know that the agent had no authority to make the pledge, the transaction will not be protected. (*g*)

Where pictures were deposited with A (whose ordinary business was that of an agent for two insurance offices), with instructions to sell them, it was held that A was an agent intrusted with the possession of goods. (*h*) But a merchant's clerk having dock-warrants in his possession in the course of his employment is not such an agent; (*k*) nor is an agent whose authority has been revoked, but who wrongfully retains the goods. (*l*)

1080. *What are documents of title.*—Every bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, is (s. 4) to be deemed a document of title; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner, or obtained by reason of the agent's having been intrusted with the possession of the goods, or of any other document of title thereto, is to be deemed and taken to have been intrusted with the possession of the goods represented by such document of title; and all contracts pledging or giving a lien

L. J., Ch. 908; 2 De G. M. & G. 441. Baines v. Swainson, 32 L. J., Q. B. 281.

(*g*) Gobind Chunder Sein v. Ryan, 15 Moo. P. C. 230. (*k*) Lamb v. Attenborough, 1 B. & S. 831; 31 L. J., Q. B. 41.

(*h*) Heyman v. Flewker, 13 C. B., N. S. 519; 32 L. J., C. P. 132. (*l*) Fuentes v. Montis, L. R., 4 C. P. 93; 38 L. J., C. P. 137.

upon such document of title are to be deemed and taken to be pledges of, and liens upon, the goods to which the same relates. The agent is to be deemed to be possessed of such goods or documents, whether they are in his actual custody or held by any other person subject to his control or for him, or on his behalf; and, where any loan or advance is bonâ fide made to any agent intrusted with, and in possession of any such goods or documents of title, on the faith of any contract in writing, to consign, deposit, transfer, or deliver them, and they are actually received by the person making such advance, without notice that the agent was not authorized to make the pledge or security, the loan or advance is to be deemed a loan or advance on the security of such goods or documents of title, though they are not actually received by the person making the loan or advance till a period subsequent thereto; and any contract or agreement, whether made direct with such agent, or with any clerk or other person on his behalf, is to be deemed a contract or agreement with such agent; and any payment made, whether by money or bills of exchange or other negotiable security, is to be deemed and taken to be an advance within the meaning of the Act; and an agent in possession, of such goods or documents is to be taken to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence. Certificates of railway stock are not goods within the 5 & 6 Vict. c. 39. (*m*)

1081. *When documents of title may be said to be intrusted to a factor or agent.*—A factor or agent who has got possession of a bill of lading, dock-warrant, or document of title without the sanction and authority of the principal, is not necessarily intrusted

therewith, although the principal has put it in the power of the agent to obtain possession of the document. If one man gives to another the key of his bureau to take out a receipt, and the latter possesses himself of a bill of lading, he can not be said to be intrusted with the latter document. (*n*) A party intrusted with a bill of lading for the purpose of sale, is not intrusted with a dock-warrant which his possession of a bill of lading may have enabled him to obtain. (*o*)

When bonds payable to bearer and passing by delivery only, were deposited with bankers for safe custody, and the bankers fraudulently deposited them with their broker as a security for money advanced and became bankrupt, it was held that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers in ignorance of the fraud. (*p*)

1082. *What are advances and loans upon deposit within the factor's Acts.*—A factor by pledging goods to an amount which does not exhaust their value, has not thereby parted with his control over the goods so as to preclude himself from making a further hypothecation for the balance of their value; and such further hypothecation will be valid against the principal. Thus, where cotton was consigned by A to B for sale, and B deposited the bill of lading with C, a broker, and authorized him to receive and sell the cotton, and subsequently gave D a lien upon the balance of the net proceeds of the cotton by order in writing communicated to and assented to by C, it was held that

(*n*) Phillips v. Huth, 6 M. & W. 599.

(*o*) Hatfield v. Phillips, 9 M. & W. 647; 14 M. & W. 665; 12 Cl. & Fin.

353. Bonzi v. Stewart, 5 Sc. N. R. 31. Jenkyns v. Usborne, 8 Ib.

524.

(*p*) Jones v. Peppercorne, 28 L. J., Ch. 158.

the subsequent charge was valid against the principal. (q) Where the plaintiff, a manufacturer, had consigned goods to one Clark, who had acted as agent for him, and also as agent for the defendant, and Clark, being liable with the defendant on a bill of exchange which had become due, obtained from the defendant £300 for the purpose of taking up the bill, and at the same time deposited the plaintiff's goods with the defendant, it was held that the payment of the £300 by the defendant to be applied by Clark in discharging the joint liability upon the bill, was not an advance or loan of money upon a deposit of goods, nor a contract of pledge, within the intent and meaning of the factors' Acts, and that the defendant consequently had no lien upon the goods as against the plaintiff. (r) An advance made to a third person at the request of the factor is within the Act. (s)

1083. *Implied warranty of title on the part of the pledgor.*—Every person who pledges goods and chattels and personal property impliedly undertakes that the property pledged is his own; and, if it turns out not to be so, the pledgee may restore it to the lawful owner coming forward and claiming the goods, and may set up the *jus tertii* in answer to an action by the pledgor for the recovery of the pledge. (t) Every person, on the other hand, who receives goods and chattels into his possession by way of pawn or pledge, impliedly undertakes to return them to the pawnor as soon as the object of the pledge has been accomplished, unless it be shown that the pledgor had

(q) *Portalis v. Tetley*, L. R., 5 Eq. 140; 37 L. J., Ch. 139.

(r) *Learoyd v. Robinson*, 12 M & W. 745. *Macnee v. Gorst*, L. R., 4 Eq. 315.

(s) *Sheppard v. Union Bank of Lon-*

don, 7 H. & N. 661; 31 L. J., Ex. 154.

(t) *Cheesman v. Exall*, 6 Exch. 344. *Jones v. Peppercorne*, 28 L. J., Ch. 158. *Biddle v. Bond*, 34 L. J., Q. B. 137.

no right to pledge them, and the owner has intervened and claimed them. Nothing contained in the seventh section of the factor's Acts is to prevent the owner from having the right to redeem such goods or documents of title, at any time before they have been sold upon repayment of the amount of the lien thereon. If the pledge has been received as security for the due payment of a debt or the performance of a contract, it must be returned by the pawnee as soon as the debt is discharged or the contract has been fulfilled, unless it has been lost or destroyed by accident, without any default or misconduct or want of proper care on the part of such pawnee.

1084. *Of the pledgor's right of redemption.*—A thing may be pledged for a certain period, or it may be pledged indefinitely, no time being fixed for its redemption, or for the happening of the event which is to give the pledgor a right to have it back. In the first case the pledgee can not demand payment of the debt, nor can the pledgor lawfully demand the restoration of the pledge, until the time appointed has expired. In the second case the pledgor is entitled to redeem at any time, by tendering to the pledgee the amount due to him, and the pledgee may compel the pledgor to redeem, or be foreclosed and lose his right of redemption altogether. The rights and remedies conceded by the common law to the pledgors and pledgees of lands and chattels in the twelfth century, before the modern system of mortgage had sprung up, are described in the learned and interesting treatise of Ranulph de Glanville. (*u*) At the present day, if the debtor pays the debt due, or tenders it to the creditor, and demands the pledge, and the creditor refuses to deliver it up, the debtor may maintain an action

(*u*) Beame's Glanville, p. 260.

for its recovery, unless his right to redeem has been barred by judgment of foreclosure, or has been forfeited under an express clause of forfeiture inserted in the original contract, or unless the pledge has been sold by the creditor pursuant to a power of sale reserved to him. (v) It is laid down in the Roman law, that mere length of possession alone by the pledgee will not have the effect of vesting the pledge in him, and that his heirs and executors remain perpetually obliged to restore the pledge, and can not acquire the ownership and right of property thereof by prescription. (y)

1085. Sale of the pledgor's right of property and right of redemption.—As the ownership and general right of property in the pledge remain vested in the pledgor, the latter may sell the pledge subject to the lien of the pledgee, and substitute the purchaser in his place, so as to entitle the latter to redeem. (z) If several chattels are pawned for one sum, separate sales may be made of each to different purchasers; but the pawnee will not be bound to part with any of the chattels until his whole debt is paid. Subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made.

1086. Forfeiture of the pledge.—By the early Roman law, the debtor and creditor might agree that, if the debtor did not pay the debt within a specified period, the pledge should be forfeited, and should become the absolute property of the creditor. But a law of Constantine prohibited such contracts, on the ground that they were unjust and oppressive to

(v) *Ratcliffe v. Davies*, Cro. Jac. 245; *Velv.* 178; *1 Bulst.* 29, 31. *Kemp v. Westbrook*, 1 Ves. sen. 278.

(y) *Cod. lib.* 10, tit. 24, lex. 10.

(z) *Franklin v. Neate*, 13 M. & W. 486.

debtors, and declared that every agreement should be null and void which provided that the thing pledged should pass to the creditor without any sale or appraisement, or that the debtor should forfeit his right of redemption if he fail to pay at the proper time. (a) This law of Constantine has been imported into the French law, (b) and the modern law of continental Europe. "The creditor can not," observes Domat, "stipulate that, if he is not paid at the time appointed, the thing pledged shall become his own property; for such an agreement would be contra bonos mores; for the pledge is given to the creditor only as a security for the debt, and not to enable him to profit by the indigence of his debtor." (c) Our own common law does not follow the later Roman and Continental law in this respect, and has not, hitherto, considered agreements for the forfeiture of pledges to be null and void, as being contrary to public policy. The court, however, acting in accordance with the rules and principles of the civil law, will relieve against the forfeiture, as we have already seen, in the case of pledges of land; but it will not in general interfere in the case of pledges of movables, (d) unless the value of the pledge greatly exceeds the amount of the debt which it was intended to secure.

1087. *Foreclosure of the right of redemption—Pledgee's power of sale.*—It would appear to be an implied term of every contract of pledge that the thing deposited shall be made available for the liqui-

(a) Cod. lib. 8, tit. 35, lex. 3. Mackeldey's Civil Law, by Kaufman, § 349.

(b) Cette loi a été adoptée dans notre jurisprudence. Elle est néces-

saire pour empêcher les fraudes des usuriers. Poth. NANTISSEMENT, No. 18.

(c) Domat, liv. 3, tit. 1, s. 3, 11.

(d) Lockwood v. Ewer, 9 Mod 278.

dation of the debt it was intended to secure, in case the pledgor is unable or unwilling to pay such debt. The law will not condemn the pledge to remain useless in the hands of the creditor, or suffer it to perish, but will enable the latter, after due notice given to the debtor, and every fair opportunity afforded him to redeem, to sell the pledge, and appropriate the proceeds of the sale in liquidation and discharge of the debt, paying over the surplus that may remain to the creditor ; (e) or, if the value of the pledge does not exceed the amount of the debt due upon it, and the costs and expenses of a sale, the creditor will be allowed to appropriate the pledge to his own use, and hold it as his own property, discharged of all claim of ownership and right of redemption on the part of the creditor. The ancient form of foreclosing or barring the pledgor's right of redemption by writ of summons commanding him to redeem the pledge or appear in court and answer the complaint of the pledgor, and admit or deny the pledge and the debt, is described by Glanville. If the debtor appeared and admitted the pledge, he was commanded to redeem it within a reasonable period ; and, if he failed to comply, liberty was given to the creditor from that time to treat the pledge as his own property, and dispose of it as his own. If the debtor denied the pledge and the debt, the creditor was put to the proof thereof. (f)

Lord Hardwicke is reported to have said that a decree of foreclosure is not necessary, in cases of pledges of personal chattels, to bar the pledgor's right of redemption, and enable the pledgee to sell ; (g)

(e) *Pigot v. Cubley*, 15 C. B., N. S. 701 ; 33 L. J., C. P. 134. *WILLES, J.*,
Martin v. Reid, 31 L. J., C. P. 126.

(f) *Beame's Glanville*, 254, n. 1.
(g) *Lockwood v. Ewer*, 9 Mod. 279.

but, so long as the ownership and right of property in the pledge have not been vested in the pledgee the latter can not sell more than his own claim or lien upon the pledge, and can only transfer the pledge burdened with the pledgor's right of redemption, unless a power of sale has been expressly or impliedly reserved to him by contract. (*h*) In order to make himself the owner of the pledge, the pledgee must bar the pledgor's right of redemption by a decree of foreclosure. (*i*) "A right of lien gives no right to sell the goods;" but, if it is reasonably to be inferred, from the nature of the transaction between the parties, that the contract was to this effect, "If I (the borrower) repay the money, you must re-deliver the goods; but, if I fail to repay it, you may use the security I have left in your hands to repay yourself," the pledgee will then be entitled to sell, after notice to the pledgor of his intention, and may satisfy the debt out of the proceeds of such sale. (*k*) If the deposit has been made to secure the payment of a sum of money by a day certain, there is, it has been held, an implied authority to sell in case of non-payment by the day named; (*l*) but notice should be given to the debtor in order to bar the equity of redemption. If notice is given to the pledgor that, unless the pledge is redeemed, and the debt due thereon paid by a given day (a reasonable time for redemption being allowed), the pledge will be sold by public auction, and the proceeds of the sale applied in liquidation of the debt, and the pledgor neglects to redeem, and pays no attention to the notice, and the

(*h*) *Micklethwaite v. Merrill*, 19 L. T. R. 61.

(*i*) *Wayne v. Hanham*, 9 Hare, 62; 20 L. J., Ch. 530.

(*k*) *Pothonier v. Dawson*, Holt, 385. *Smart v. Sandars*, 3 C. B. 401; 5 Ib

915.

(*l*) *Pigott v. Cubley*, *ante*.

sale then takes place, the pledgor may fairly be deemed to have authorized the sale, or to be an assenting party thereto. (*m*)

By the Roman law the contract of pledge was held to carry with it an implied authority from the pledgor to the pledgee to sell the pledge in case of non-payment of the debt due thereon. In conducting the sale the creditor was deemed to be the mandatory or agent of the debtor, selling on behalf of the latter; and he was consequently bound to promote the interests of the debtor to the utmost of his power. He could not himself become the purchaser of the pledge, either directly or indirectly. An action for eviction from want of title could not be brought against him by the purchaser after the sale, but only against his principal, the pledgor, unless he had sold *mala fide*, or without any right to sell, in which case he was himself responsible for all the damages that resulted from the sale. (*n*) If, after the pledge had been offered for sale with the necessary formalities, an acceptable purchaser could not be found, the creditor might then apply to the court to have it appraised and adjudged to him at its value. Still, even in this last case, the debtor had a right of redemption for two years after the decree. (*o*) If it was made part of the contract that the creditor should be entitled to take the pledge himself in case of default, at a price to be mutually agreed upon between himself and the debtor, or to be fixed by the court or some third party, this agreement might be enforced as a conditional sale. (*p*) In the French law, when an express power of sale has been reserved

(*m*) *Tucker v. Wilson*, 1 P. Wms. 260.

(*n*) Dig. lib. 20; lib. 13, tit. 8, lex. 4. Cod. lib. 4, tit. 24; lib. 8, tit. 13-34. Mackeldey's Civil Law, § 350.

(*o*) Cod. lib. 8, tit. 22, tit. 34. Dig. lib. 42, title 1.

(*p*) Dig. lib. 20, tit. 1, lex. 16, § 9. Domat, liv. 2, tit. 1, s. 3, 11.

by the contract, the creditor may summon the debtor to pay, and, in default of payment, procure a judge's order for the sale, after a certain time to be given for redemption at the discretion of the judge. (q)

1088. *Accounts between pledgor and pledgee.*—Whenever the pledge has been sold by the pledgee, he is liable to be called upon to account for the proceeds of the sale, and to pay over to the pledgor any surplus that may be found to exist after deducting the debt, costs, and expenses. The possession of the pledge does not suspend the right of the pledgee to proceed personally against the pledgor for the recovery of the debt in respect of which the pledge was taken, as it is only a collateral security. (r) In the Roman law, if the pledgee neglected to make the pledge available for the liquidation of the debt when he ought to have done so by the terms of the contract, he could not proceed personally against the debtor. (s)

1089. *Of the custody and safe keeping of the pledge.*—Every person who receives goods and chattels or securities into his possession by way of pawn or pledge impliedly undertakes to take the same care of them that a prudent and cautious man ordinarily takes of his own property. His liability in this respect is analagous to that of the hirer of chattels for use the contract being, like the contract of letting and hiring, a contract for the mutual benefit of both parties, and not a contract for the sole and separate advantage of one of them, to the exclusion of the other, like the contract of deposit or the contract of borrowing and lending. The pawnee or

(q) Domat, liv. 3, tit. 1, s. 3 10.

(r) Lawton v. Newland, 2 Stark. 72.
South Sea Company v. Duncumb, 2

Str. 919; Holt, 461. Anon., 12 Mod.
564. Scott v. Parker, 1 Q. B. 809.

(s) Pand. lib. 10, tit. 6. Cod. lib. 8,
tit. 14, lex. 24.

pledgee, consequently, is not responsible for the loss of the goods by robbery or accident, if he has taken ordinary and reasonable care of them; (*t*) and he may, notwithstanding the loss and his consequent inability to return the deposit, sue for the recovery of his debt. But, if the goods have been stolen under circumstances manifesting a want of ordinary and reasonable care for their safety, he will of course be responsible for the loss. And it is not enough for the pawnee to say that the goods have been lost by robbery or accident; he must prove the fact, and show that he was free from blame. (*u*)

1090. *Use of things pledged.*—"If the pawn be something that will be the worse for wear, as clothes, the pawnee can not use it; but, if it will not be the worse for wear, as jewels, the pawnee may use them; but then it must be at his peril; for, if he is robbed in wearing them, he is answerable. Also, if the pawn be of such a nature that the keeping is a charge to the pawnee, as if it be a cow or horse, the pawnee may milk the cow or ride the horse; and this is in recompense of the keeping. If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them at all events; because the pawnee, by detaining them after tender of the money," (the time of payment having arrived, or no time being fixed), "is a wrongdoer, and it is a wrongful detainer of the goods ;

(*t*) Syred v. Carruthers, Ell. Bl. & Ell. 469; 27 L. J., M. C. 273. Placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibeat, quam si præstiterit, et aliquo fortuito casu rem amiserit, securum esse, nec impe-

diri creditum petere. Instit. lib. 3, tit. 15, § 4, copied by Bracton, 99 b. Dig. lib. 13, tit. 6, lex. 5, § 2; tit. 7, lex. 14.

(*u*) Doorman v. Jenkins, 2 Ad. & E. 256. Cod. lib. 4, tit. 24, lex. 5 GLANVILLE, by Beames, p. 253.

and a man that keeps goods by wrong must be answerable for them at all events." (*x*)

If a pawnee re-pawns or sells, the original pawnor can not sue the sub-pawnee or vendee to recover the pledge without paying or tendering the amount for which the pledge was originally made. (*y*)

As the right of property in the pledge remains, as we have already seen, in the pledgor until foreclosure, forfeiture, or sale, the pledgor may maintain an action against a stranger who unlawfully possesses himself of the goods; but, if there is any injury or conversion by a stranger for which an action will lie on the part of both the pledgor and pledgee, a recovery by one ousts the other of his right to recover; for there can not be a double satisfaction. (*z*) If the pledgor has sold his interest in the pawn to a third party, the latter will be the proper person to sue for damages resulting from injury to the pawn from the default or negligence of the pawnee, as the owner for the time being is the proper plaintiff. (*a*)¹

(*x*) *Coggs v. Bernard*, 2 *Ld. Raym.* S. 783. *Halliday v. Holgate*, *L. R.*, 3 *Q.B.* 12. *Smith's Leading Cases*, 5th ed. Ex. 299; 37 *L. J.*, Ex. 174.

(*z*) *Bac. Abr. TROVER, C. Rooth*

(*y*) *Donald v. Suckling*, *L. R.*, 1 *Q. B.* 585; 35 *L. J.*, *Q. B.* 232; 7 *B. & W.*

(*a*) *Franklin v. Neate*, 13 *M. & W.* 486.

¹ A pawn is a contract entered into for the mutual benefit of both parties, and the measure of responsibility of the bailee is that of ordinary care. *Hilliard on Contracts*, ii. 309-318, and case there quoted. It vests specially the pledgee, and not the latter, as does a mortgage. *Story on Contracts*, § 868. At common law there can not be a technical pledge of property not then in existence, or to be acquired by the pledgor in future. *Smithurst v. Edmunds*, 14 *N. J. Eq.* (1 *McCart*) 408; *Macomber v. Parker*, 14 *Pick.* 497; *Cortelyou v. Lansing*, 2 *Cal. Cas.* 200; *Smith v. Atkins*, 18 *Vt.* 461. To constitute a pledge there must be evidence that the transaction was in-

1091. *Statutory rights and liabilities of pawnbrokers.*—The rights and liabilities of pawnbrokers are now regulated by the Pawnbrokers' Act, 1872, (*b*) which took effect from December 31st, 1872. The Act, however, does not apply to loans of above ten pounds, or to loans made before the commencement of the Act, which are regulated by the old law.

1092. *Who are to be deemed pawnbrokers.*—Every person who keeps a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases, or receives, or takes in any goods or chattels, and pays, or advances, or lends thereon any sum of money not exceeding £10, with or under any agreement or understanding, express or implied, or to be from the nature and character of the dealing reasonably inferred, that such goods or chattels may be afterwards redeemed or re-purchased on any terms whatever, is to be deemed to be a pawnbroker within the meaning of the Act. (*c*) Every pawnbroker's name must be placed over the door of his place of business; (*d*) and therefore a secret partnership in the business of a pawnbroker is illegal and void. (*e*)¹

1093. *Sale of things pledged.*—Pawnbrokers' sales are regulated by the provisions of the Pawnbrokers' Act. If, at any time before the sale has actually taken place, the pledgor tenders the principal, interest,

(*b*) 35 & 36 Vict. c. 93.

(*c*) 35 & 36 Vict. c. 93, s. 6.

(*d*) 35 & 36 Vict. c. 93, s. 13.

(*e*) *Armstrong v. Lewis*, 2 Cr. & M. 297; 3 Myl. & K. 53. *Gordon v. Howden*, 12 Cl. & Fin. 242. *Frazer v. Hill*, 1 Macq. H. L. C. 392.

tended to constitute a pledge. *Thompson v. Andrews*, 8 Jones, 453. A pledge obtained by false representations vests no interest in a pledgee. *Mead v. Bunn*, 32 N. Y. 275.

¹ See Revised Statutes of N. Y., 6th Ed., vol. ii., 1006.

and expenses incurred, he has a right to have back the things pledged, and the pawnbroker can not lawfully proceed with the sale. (f)

1094. *Warranties on sales of unredeemed pledges.*—We have already seen that, in the case of sales by pawnbrokers of unredeemed pledges expressly sold as such, the pawnbroker only warrants the subject-matter of the sale to be a pledge the time for the redemption of which has expired. He sells merely his own title and interest in the pledge; and it is the duty of a purchaser to investigate that title; and, if he is evicted by reason of the want of title in the pledgor to make the pledge, he has no remedy over against the pawnbroker, unless the latter expressly warranted the title.

1095. *Imperfect hypothecation of goods and chattels—Licenses to distrain to secure payment of a debt.*—The common law repudiates the hypothecation of chattels or movables in its general and extended signification; for, if parties who had bought things in a public market, or in the ordinary way of trade, of persons who had the possession and visible ownership of them, were liable, after they had paid the purchase money, to be called upon by third parties who had secret charges or liens upon such goods, for further payment, all public confidence would be destroyed, and trade and commerce annihilated. But the law permits goods and chattels to be subjected to what is called by Continental jurists imperfect hypothecation, *i.e.*, a debtor may, by deed under seal grant to his creditor a right to seize and sell a specified chattel, or all his goods and chattels generally, in satisfaction and discharge of the debt, in case of the

(f) *Walter v. Smith*, 5 B. & Ald. 441.



SEC. III.] MORTGAGE OF CHATTELS.

non-payment thereof at an appointed period. Such a power gives the creditor no right to follow the goods into the hands of third parties; but so long as they remain in the possession of the debtor himself and continue his property, the creditor may seize them in the same way that a landlord distrains and sells the goods and chattels of his tenant on the demised premises for rent in arrear. (*g*) A power of this description may be made to extend to all the after-acquired chattels of the debtor, as well as to the goods and chattels of which he was possessed at the time of the contract or grant, and is analogous to the power possessed by a creditor in the Roman and Continental law, under a general hypothecation of present and after-acquired property. Where the owner of a cow, being indebted to the defendant for agistment, and being desirous of contracting a further debt for straw, &c., agreed with the defendant that the cow should stand as a security for the debt, and that the defendant should be at liberty, upon a certain contingency, to take the cow wherever he could find her, and hold her till he was paid, and, the contingency having happened, the defendant seized the cow, it was held that he had a right so to do, and that he was entitled to detain her as against the owner, until he received payment of his debt. (*h*) The right of detainer gives no right of sale, although it is exercised at great expense, (*i*) but, if a debtor gives to his creditor a license to enter upon his land, and seize his cattle and crops, and sell them in satisfaction and discharge of the debt, the licensee will be justified, as against the licensor, in

(*g*) *Chidell v. Galsworthy*, 6 C. B. N. S. 471.

(*i*) *Thames Iron Works, &c., v. Patent Derrick Company*, 29 L. J., Ch.

(*h*) *Richards v. Symons*, 8 Q. B. 714.

seizing and selling under the license. (*k*) But the operation of a license of this description can not be extended beyond the immediate parties to it, and, therefore, as soon as the rights of third persons intervene, the power or authority becomes nugatory and useless. Thus, where a vendor entered into a written agreement for the sale of a coach on credit, upon the terms that, if the price was not paid pursuant to the agreement, he "should have and hold a claim upon the coach;" and the purchaser died, and the money not being paid, the vendor got possession of the coach and detained it as a security for the debt, it was held that, although he would have been justified in so doing as between himself and the purchaser, yet, the latter being dead, he had no right to detain it as against the purchaser's personal representative, (*l*) or against a trustee in bankruptcy. (*m*) Neither can the license be assigned or granted over to another so as to enable the assignee to distrain upon the licensor; (*n*) nor can it prevail, as we have seen, against the claim of a judgment creditor, so long as parties claiming under it have not perfected their title by taking possession of the property before it is seized in execution by the sheriff. A legal interest in the property *bonâ fide* acquired before possession taken by the person claiming under the license, will prevail over the claim of the latter. (*o*) A promise to pay money when the debtor receives a debt, due to him from a third person does not amount to an equitable charge on the debt. (*p*)

(*k*) Carr v. Allatt, 27 L. J., Ex. 385. ties, &c., 28 L. J., Q. B. 236.
 (*l*) Howes v. Ball, 7 B. & C. 484. (*o*) Reeve v. Whitmore, Martin v. Whitmore, 33 L. J., Ch. 63. And see Holroyd v. Marshall, 33 Ib. 193.
 (*m*) Carr v. Acraman, 11 Exch. 566. (*p*) Field v. Megaw, L. R., 4 C. P. 660.
 (*n*) Brown v. Metropolitan Coun-

1096. *Registration of licenses to seize and sell goods and chattels.*

1097. *Revocation of the license by act of bankruptcy.*—A license to seize and sell chattels in satisfaction and discharge of a debt gives no title to any specific chattels; but, when executed by the creditor's taking possession of property under the license, it clothes the licensee with the ownership of such property. (q) If, therefore, a debtor, after he has granted his creditor a license of this description, assigns all his property to trustees for the benefit of the creditors, the license will be annulled as regards the property so assigned; and if the assignment should be void as being an act of bankruptcy, the property would be transferred to the trustee in bankruptcy free from the operation of the license. (r)

1098. *Mortgages of ships and of shares in vessels.*—It was at one time held that the Court of Chancery would give no effect to a contract to assign a ship as security for money due, not registered in accordance with the 17 & 18 Vict. c. 104. (s) But by the 25 & 26 Vict. c. 63, s. 3, the expression "beneficial interest," whenever used in the second part of the 17 & 18 Vict. c. 104, includes interests arising under contracts and other equitable interests; and the intention of that Act is declared to be that, without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the Act on registered owners and mortgagees, and

(q) *Congreve v. Evetts*, 10 Exch. 25 L. J., Ex. 90. *Baker v. Gray*, 17 C. B. 462; 25 L. J., C. P. 161.

(r) *Carr v. Acraman*, 11 Exch. 566;

(s) *Liverpool Borough Bank v. Turner*, 29 L. J., Ch. 827.

without prejudice to the provisions therein contained relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property. (t) The mortgagee is not to be deemed to be the owner of the ship or share, (u) nor the mortgagor to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt. The mortgagor in possession may employ and charter the ship; and the court will restrain the mortgagee from interfering with his contracts. (x) The mortgagee has power absolutely to dispose of the mortgaged ship or share, and to give effectual receipts for the purchase-money; but, when there are several mortgages, no subsequent mortgagee can, except under an order of court, sell such ship or share without the concurrence of every prior mortgagee. A registered mortgage of a ship or share is not affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding the mortgagor at the time of his becoming bankrupt may have the ship in his possession and disposition, and be reputed owner thereof. Provision is made for the transfer of mortgages and for the transmission of the interest of mortgages, by death, bankruptcy, insolvency, or marriage. (y) The guardian of a registered infant owner of a ship has no power under the Mer-

(t) See *Ward v. Beck*, 32 L. J., C. P. 113.

(u) *European, &c., Company v. Royal Mail, &c., Company*, 4 K. & J. 676. *Dickenson v. Kitchen*, 8 Ell. & Bl.

789. *Marriott v. Anchor Reversionary Company*, 30 L. J., Ch. 122, 571

(x) *Collins v. Lamport*, 34 L. J., Ch. 196.

(y) 17 & 18 Vict. c. 104, ss. 65-83.

chant Shipping Act, s. 99, to sell or mortgage the ship on behalf of the infant. (z)

A mortgage of a ship carries with it the freight; and a mortgagee who takes possession, or does some act equivalent to taking possession, before the freight becomes payable, is entitled as against the mortgagor and his assigns, to receive it; (a) but, until the mortgagee takes possession or does some equivalent act, the mortgagor is entitled to the freight, and is not accountable to the mortgagee for what he receives. When the mortgage is of the entirety of the vessel, the mortgagee may take exclusive possession; when it is of shares only, he can not take possession so as to prevent the other part-owners from also taking possession. A mortgagee of shares in a ship may, without formally taking possession, give notice of his interest and require payment to himself of his share of the freight. (b) A mortgagee of a ship is entitled to payment in priority to materialmen not in such actual possession at the time of supplying the materials as to give them a lien. (c) A subsequent mortgage of a ship duly registered has priority over a claim for necessities. (a) The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge he may have acquired on the freight

(z) *Michael v. Fripp*, L. R., 7 Eq. 95; 38 L. J., Ch. 29.

(a) *Rusden v. Pope*, L. R., 3 Ex. 269; 37 L. J., Ex. 137. *Brown v. Tanner*, L. R., 3 Ch. 597; 37 L. J., Ch. 923. *Wilson v. Wilson*, L. R., 14 Eq. 32; 41 L. J., Ch. 423.

(b) *Cato v. Irving*, 21 L. J., Ch.

675. *Willis v. Palmer*, 7 C. B., N. S. 340; 29 L. J., C. P. 194. *Gardner v. Cazenove*, 1 H. & N. 435; 26 L. J. Ex. 17.

(c) *The Scio*, L. R., 1 Ad. 353.

(d) *The Pacific*, 2 B. & L. 243. *The Two Ellens*, L. R., 3 Ad. 345; 41 L. J., Ad. 33.

in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. (*e*) A claim by a master for disbursements takes rank as a maritime lien, and is prior to the claim of the mortgagee of the ship. (*f*)

1099. *Maritime liens—Bottomry.*—The contract of hypothecation of ships known to the civil law, and enforced in our courts of Admiralty, is a contract whereby the captain of a vessel in a foreign port, not having any credit in the port where the vessel is lying, is enabled to obtain money for the repair and equipment of the vessel, and for supplies and sea stores for the prosecution of the voyage, (*g*) by creating a charge or lien upon the vessel itself in favor of the lender, so that, if the vessel is sold or mortgaged by the owners, it will pass burdened with the charge or debt into the hands of the purchaser or mortgagee. The charge or lien created by a contract of this description is called a maritime lien. Wherever a maritime lien exists, it gives a right or claim upon a vessel, *jus ad rem*, to be carried into effect by legal process. This claim travels with the vessel into whosoever possession it may come, and is enforced in the Court of Admiralty by a proceeding in *rem*. (*h*)

By the Roman law, every person who repaired or fitted out a vessel, or lent money for those purposes had a lien upon the ship without a formal instrument of hypothecation. But by the law of England no such

(*e*) *Liverpool Marine Credit Co. v. Wilson*, L. R., 7 Ch. 507; 41 L. J., Ch. 798.

(*f*) *The Mary Ann*, 35 L. J., Adm. 6.

(*g*) *The Huntley*, 1 Lush. 24. *The Edmond*, 30 L. J., Adm. 128. But

disbursements for charges for which the consignee of the cargo is liable are not the subject of bottomry. *Ib.*

(*h*) *Harmer v. Bell*, 7 Moore, P. C.

267. *Menetone v. Gibbons*, 3 T. R.

267. *Ladbroke v. Crickett*, 2 Ib. 649.

right can be acquired but by express agreement ; and a ship-master can only make such an agreement if he act within the scope of his authority. The contract by which a maritime lien is generally created by English ship-masters is termed a contract of bottomry, from the keel or bottom of the vessel being generally expressly hypothecated, or charged with the payment of the debt, and being used figuratively in the contract to denote the whole ship. It is essential to the validity of this species of hypothecation, that the sea risk should be incurred by the lender, that is to say, that the debt should be incurred, and charged upon the vessel, upon the understanding that, if the vessel is lost, the lender loses his money, but, if it arrives safe at the port of destination it shall stand charged with the payment of the debt. The master has no authority to hypothecate the vessel in any other manner ; (i) and the Court of Admiralty has no jurisdiction to enforce any other contract. (k) As a remuneration for this risk, the creditor has always been entitled to take and charge upon the vessel any rate of interest or remuneration for the loan or debt that the parties might agree upon, termed maritime interest. (l)

§ 1100. *Of the power of hypothecation of the ship-master.*—The extent of the authority of the master of a vessel to bind the owners either of the ship or cargo is derived from, and governed by, the law of the flag. (m) By our law the ship-master has no right to create a lien upon the vessel until he has made every reasonable endeavor to obtain supplies, repairs, or money, upon his own personal credit or that of the

(i) *Stainbank v. Fenning*, 11 C. B. 51 ; 20 L. J., C. P. 226.

(j) *Joy v. Kent*, Hardr. 418.

(k) *The Royal Arch*, 1 Swabey, 281.
The Indomitable, 5 Jur., N. S., 632.
The Ida, L. R., 3 Ad. 542 ; 41 L. J.,

(m) *The Karnak*, L. R., 2 A. & E. 289 ; *Ib.*, 2 P. C. 505 ; 37 L. J. Adm. 41 ; 38 *Ib.* 57.

owners. (*n*) It is not until all other means of obtaining necessities fail, that he has authority to hypothecate the ship, and to give maritime interest, which is in effect defeating the object of the adventure, and transferring to the creditor much of the profits of the voyage. If the master at a foreign port is able to communicate speedily with the owners, it is his duty to do so before he orders repairs or supplies; (*o*) and where practicable he must do so before he can create a lien on the vessel. It is no excuse for not communicating with the owner under such circumstances, that he is insolvent, unless he has been judicially declared so, and the ownership of the vessel has vested in his trustee in bankruptcy, in which case notice should be given to the trustee. (*p*) If the ship-master borrows money for his own purposes or for those of the consignee of the cargo, (*q*) as distinguished from those of the ship-owners, his contract will fail to create a lien upon the vessel. (*r*) Repairs executed, or advances made, on personal credit can not afterwards be converted into a bottomry transaction. There may, however, be cases of extreme urgency, where the master is dead, and the merchant advances money intending to require a bottomry bond from the beginning, and gives the owners the earliest possible notice of his intention, in which the bond might be upheld, though no agreement for it was originally made: but they are cases

(*n*) *Heathorne v. Darling*, 1 Moore, P. C. C. 5. *The Nel-on*, 1 Hag. 176. *La Ysabel*, 1 Dod. 273. *The Orelia*, 3 Hag. 84. *The Dunvegan Castle*, *ib.* 331.

(*o*) *Wallace v. Fieldin*, 7 Moore, P. C. C. 398. *Duranty v. Hart*, 2 Moo. P. C., N. S. 289. *The Olivier*, 1

Lush. 484. *The Hamburg*, 32 L. J., Adm. 161.

(*p*) *The Panama*, L. R., 3 P. C. 199 39 L. J., Adm. 37.

(*q*) *The Edmond*, 30 L. J., Adm. 128.

(*r*) *The Reliance*, 3 Hag. 66.

of exception to the general principle. The master ought, in general, to be distinctly apprised of the intention of a lender of the money to require a bottomry bond, that he may have time and opportunity to exercise his discretion as to entering into the contract, or to try at least to take other means to avoid the necessity, to advise with the owners of the ship and cargo, if it be practicable, or, if not, at least to consult with persons on the spot.

But, although, when a ship-master orders repairs and supplies on credit given to him personally, those who gave the credit can not take a bottomry bond, yet a merchant, a stranger to the transaction, or even an agent, if he has not made himself responsible, may advance money on bottomry to liquidate those demands; (s) and a bottomry bond may, it seems, be given at the same time with, and as a collateral security for, bills of exchange for repairs and necessaries for the voyage, in this sense that, if the bills of exchange are honored, the bottomry bond is discharged. (t)

If, after a bond hypothecating the vessel has been entered into, the vessel becomes damaged, and puts into a foreign port for shelter, it can not be sold by the master so as to extinguish the maritime lien; and, as the doctrine of constructive total loss does not apply to bottomry bonds, if the ship is found unseaworthy, and sold, the bondholder will be entitled to a first charge on the proceeds. (u) In the case of British ships, the certificate of registry is, as we have already seen,

(s) *The Wave*, 15 Jur. 518. *The Augusta*, 1 Dods. 283. *The Laurel*, Ex. 341. *The Emancipation*, 1 Wm Rob. 124.

33 L. J., Adm. 17. (u) *The Great Pacific*, L. R., 2 P. C

(t) *Stainbank v. Shepard*, 22 L. J., 516; 38 L. J., Adm. 45.

the great evidence of title; and all bottomry bonds and hypothecations ought to be, and generally are indorsed upon it; and no man should purchase a British ship, even in a foreign port, without seeing the certificate. It is the duty of purchasers of British ships in foreign ports to make strict inquiries and be especially careful to guard themselves against liens which adhere to the ship; and they can not be safe in cases of sale by the master, unless recourse is had to a court of justice, and a decree is obtained for the sale of the vessel. (x) A British consul in a foreign port is entitled, under certain circumstances of urgent necessity, when the master is dead, to hypothecate a vessel and cargo through the medium of a bottomry bond. (y)

1101. *Lien on vessels causing damage.*—The owner of a vessel damaged at sea by collision with another vessel has a lien upon the vessel causing the damage, which may be enforced in the Court of Admiralty by a proceeding in rem against the vessel, so that, if the vessel causing the damage is carried to a distant port, and sold to a bonâ fide purchaser without notice of the lien, the vessel may nevertheless be attached in the hands of such bonâ fide purchaser, and sold to satisfy such damage. But this lien may be lost by negligence or delay where the rights of third parties are thereby compromised. (z) A maritime lien is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached. (a) But no bottomry bondholder

(x) *The Catherine*, 15 Jur. 231.

S., 1.

(y) *The Cynthia*, 16 Jur. 748.(a) *Harmer v. Bell*, 7 Moore, P. C.(z) *The Europa*, 2 Moo. P. C., N. 285.

or mortgagee can be a competitor with a successful suitor in a cause of damage in the Admiralty Court. The lien of the latter will prevail over both the mortgage and the bottomry bond, unless the bottomry bond has been granted after the damage has been done.

1102. *Priority of maritime liens.*—Where there were two bottomry bonds attaching on the vessel causing the damage, one entered into before, and the other after, the collision, it was held that the lien for the damage must be preferred to the lien of the first bondholder, but that it did not extend to the increased value of the vessel resulting from repairs effected at the cost of the second bondholder. (*b*) Where several bottomry bonds have been given by the master at different periods during the voyage, those of the latest date have the priority of payment, on the supposition that the last bond operates for the protection of the prior interests. (*c*) A bottomry bond also executed under the pressure of necessity at a foreign port will supersede a previous mortgage of the ship. (*d*)

1103. *Hypothecation of cargoes and merchandise.*—The master of a ship may, under the pressure of extreme necessity, and where he is unable to communicate with the owner, (*e*) hypothecate the cargo as well as the ship, to enable him to raise funds to prosecute the voyage and deliver the goods at the port of destination. He is clothed with an implied authority to take whatever steps ought to be taken to protect them from impending destruction. (*f*) But he can

(*b*) *The Aline*, 1 W. Rob. 120.

294.

(*c*) *The Betsy*, 1 Dods. 289. *The Rhadamanthe*, *Ib.* 201.

(*e*) *Australasian Steam Navigation Co. v. Morse*, L. R., 4 P. C. 222.

(*d*) *The Duke of Bedford*, 2 Hag.

(*f*) *The Gratitude*, 1 Rob. 245.

do no more than the owners themselves could if actually present ; and he can not sell against their will. (g) He may create and continue a charge upon the cargo in favor of the lender of the money, so long as such cargo remains in his possession ; but he has no power to hypothecate it so as to enable the creditor to follow it after it has been sold or transferred. (h) Where a ship, freight and cargo were hypothecated at a foreign port by one bottomry bond for necessary repairs, and the plaintiff's goods formed part of the cargo so hypothecated, and the ship and freight realized less than the sum borrowed, and the goods became liable for the deficiency, and the plaintiff was compelled to pay it to release his goods, it was held that he might maintain an action against the shipowner for the recovery of the money he had been obliged to pay to release his cargo ; also that the shipowner could not abandon the ship and freight, and refuse to ratify the act of the master, because the costs and expenses exceeded the value of the ship, when repaired, and the freight ; and that " a merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair, or otherwise, is not bound to inquire into the expediency of incurring the expense of these repairs with reference to the interest of the owner." (i) By the French law, on the contrary, the shipowner in a similar case may abandon the ship and freight, and, if he does so, will not be liable to the shipper for money paid to release the cargo. (k)

(g) *Australasian Steam Navigation Co. v. Morse*, L. R., 4 P. C. 222. *Benson v. Duncan*, 3 Ib. 644.
 (h) *Busk v. Fearon*, 4 East, 319. (k) *Lloyd v. Guibert*, 6 B. & S. 100 ; L. R., 1 Q. B. 115 ; 33 L. J., Q. B. 241 ; 35 L. J., Q. B. 74.
 (i) *Duncan v. Benson*, 1 Exch. 537.

1104. *Illegal pledges.*—By the Mercantile Shipping Act, 1854, s. 50, any pledge of the certificate of registry of a ship is made illegal and void ; and, therefore, if a sole owner and captain pledges the certificate for good consideration, he may nevertheless redemand the document for the purposes of navigation, and may maintain an action against the pledgee if it is not delivered up on request. (*l*)

1105. *Mortgages of fixtures* may be made through the medium of any instrument of conveyance in writing, and need not be by deed. (*m*) If certain fixtures are enumerated in a mortgage-deed, and there is then a clause embracing all fixtures upon the premises, fixtures of all kinds will pass to the mortgagee. (*n*) If the mortgagor makes default in payment of the mortgage-debt at the time appointed, the mortgagee may proceed to sell, without taking proceedings to foreclose, and may apply the proceeds of the sale in liquidation of the mortgage-debt, interests, and costs. (*o*) But he will be ordered to account for and pay over any surplus that may remain. (*p*) If he does not think fit to sell, he can obtain a decree of foreclosure, and bar the equity of redemption, and make the property his own. (*q*)

1106. *Right to fixtures as between mortgagor and mortgagee.*—A mortgagor in possession may become tenant-at-will to the mortgagee, or tenant at sufferance, but he is not, in general, tenant for any term. The cases, therefore, respecting the right to disannex and remove fixtures as between landlord and tenant

(*l*) *Wiley v. Crawford*, 1 B. & S. 253 ;
30 L. J., Q. B. 319. *Ante.*

(*m*) *Thompson v. Pettit*, 10 Q. B.
101. *Ante.*

(*n*) *Haley v. Hammersley*, 30 L. J.,
Ch. 771.

(*o*) *Tucker v. Wilson*, 1 P. Wms.
261. *Lockwood v. Ewer*, 2 Atk.

303.

(*p*) *Harrison v. Hart*, 1 Com. 393.

(*q*) *Wayne v. Hanham*, 9 Hare, 62

have no application to the case of mortgagor and mortgagee. A mortgage made by the owner of the inheritance will, in general, pass all the fixtures thereon, though they are not named in the deed, and although they are trade fixtures which have been annexed to the freehold, for the more convenient using of them, and not to improve the inheritance, and are capable of being removed without any appreciable damage to the freehold. (*r*) They pass to the mortgagee as part and parcel of the inheritance; and the mortgagor does not, by becoming tenant to the mortgagee, acquire any right to remove any portion of them, although they would be removable in ordinary cases as between landlord and tenant. (*s*) Trade fixtures, affixed to mortgaged freehold premises after the mortgage by the mortgagor and his partner occupying the premises for the purpose of their trade, pass to the mortgagee. (*t*)

1107. Registration of bills of sale of fixtures.—

By the Bills of Sale Act, 1854, the expression “personal chattels” in that Act includes fixtures capable of complete transfer by delivery. (*u*) A conveyance of the freehold is not touched by this statute, and does not require registration, merely because it carries with it a number of valuable fixtures annexed to the freehold. (*x*) Fixtures annexed to the freehold by the owner of the inheritance, for the purpose of improving the inheritance, are not fixtures capable of complete

(*r*) *Climie v. Wood*, L. R., 3 Ex. 257; *Ib.* 4 Ex. 328; 37 L. J., Ex. 158; 38 *Ib.* 223. *Holland v. Hodgson*, L. R., 7 C. P. 328; 41 L. J., C. P. 146.

(*s*) *Walmsley v. Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97. *Mather v. Fraser*, 2 Kay & J. 536; 25 L. J., Ch. 361. *Halsey v. Hammersley*, 30 L. J., Ch. 771.

(*t*) *Cotton, ex parte*, 2 M. D. & D. 725. *Cullwick v. Swindell*, L. R., 3 Eq. 249; 36 L. J., Ch. 173.

(*u*) 17 & 18 Vict. c. 36, s. 7.

(*x*) *Mather v. Fraser*, 2 Kay & J. 558; 25 L. J., Ch. 361. *Boyd v. Shorrocks*, L. R., 3 Eq. 72. *Holland v. Hodgson*, L. R., 7 C. P. 318; 41 L. J., C. P. 146.

transfer by delivery within the Bills of Sale Act. (y) But fixtures of this sort may, by the dealings and transactions of the owner of the inheritance, be disannexed from the inheritance, and made transferable chattels; and bills of sale of fixtures so severed and transferred independently of the freehold come within the operation of the Bills of Sale Acts, and must be registered. Wherever a deed of conveyance by way of mortgage creates a separate charge on machinery and fixtures distinct from the land, and gives the grantee a right to disannex such machinery and fixtures from the freehold, and sell them, the instrument is a bill of sale of personal chattels, and must be registered. Thus, where there had been a mortgage to M. of the freehold of a mill with all the mill machinery thereon, and then an assignment by the mortgagor of the equity of redemption to P., together with certain machinery which had been fixed in the mill by the mortgagor since the date of the first mortgage, and after that a further transfer by the mortgagor of machinery which he had put into the mill since the date of the assignment of the equity of redemption, it was held that the parties to the separate transferring of the fixtures, having treated them as severed from the reversion, and transferable as personal chattels, had brought them within the operation of the Bills of Sale Acts, and rendered registration essential to the validity of the transfer as against assignees and creditors. (z) And where the mortgagor has a limited interest in the land, such as a term of years, and an absolute interest in the fixtures, and he mortgages his interest in both by the same deed, the instrument is,

(y) *Walmsley v. Milne*, 7 C. B., N. & Ill. 890; 26 L. J., Q. B. 100. *Whitmore v. Empson*, 23 Beav. 313.

., 115.

Waterfall v. Penistone, 6 Ell.

so far as the fixtures are concerned, a bill of sale of personal chattels, and requires registration. (a)

SECTION IV.

MORTGAGE, ETC., OF INCORPOREALS.

1108. *Mortgages of shares and stock* in a public company may be effected by the execution by the mortgagor of the ordinary deed of transfer conveying the shares to the mortgagee in consideration of the payment of the mortgage-money, as in the case of an absolute sale, taking at the same time a separate deed from the mortgagee, admitting that the transfer, though absolute on the face of it, was in reality made by way of mortgage, and undertaking to re-transfer the shares by a given day on repayment by the transferee of the mortgage-money. If the transfer is on the face of it made conditional by way of mortgage, and not in the ordinary form of transfer given by the statute incorporating the company, the company will refuse to register it, as they can not, as we have seen, place on the register transfers complicated with trusts and conditions. (b) Foreclosure, and not sale, is the remedy of an equitable mortgagee of a share in a mining partnership. (c)

If a person transfers his shares in a company, by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he

(a) *Hawtry v. Butler*, L. R., 8 Q. B. 290; 42 L. J., Q. B. 163.

(b) *Reg. v. General Cemetery Com-*

pany, 6 Ell. & Bl. 415; 25 L. J., Q. B. 342.

(c) *Redmayne v. Forster*, L. R., 2 Eq. 467; 35 L. J., Ch. 847.

can not compel his mortgagor to indemnify him, unless he comes to redeem the shares. (*d*)

1109. *Mortgages of stock and shares void by reason of reputed ownership.*—If money is advanced on the security of a transfer of shares made by way of mortgage, and the transfer is not registered in the register of shareholders of the company, so that the mortgagor still appears on the register as the holder of the shares, the shares will be in his order and disposition, and in case of his bankruptcy, will pass to his trustee, provided the legal power to transfer the shares still continued in the mortgagor; but, if the transfer can not be made without the production of the mortgagor's certificates of proprietorship, and these certificates have been placed in the hands of the mortgagee so as to give the latter an equitable lien upon them, then, as the mortgagor has no power of transfer, the shares are not in his order and disposition. (*e*)

1110. *Lien upon shares and stocks.*—Certificates of proprietorship of shares frequently have a notice at the foot of them warning the shareholder that no transfer of his shares can be effected without the production of that certificate; and the companies refuse to register a transfer deed unless the certificates of proprietorship of the transferror have previously been deposited at the transfer office. If, therefore, a shareholder borrows money on the security of shares, and deposits his certificates in the hands of the lender, accompanied by an agreement, in writing, to transfer the shares to the lender or to his nominee, in case of the non-payment of the money by the time appointed, there will be a good charge upon the shares; (*f*) but

(*d*) Smith's Man. of Eq., 11th ed., p. 339.

(*e*) Harrison, *ex parte*, 3 Deac. 196.

(*f*) Richardson, *ex parte*, 3 Deac. 503. Littledale, *ex parte*, 6 De G. M. & G. 730. Stewart, *ex parte*, 34 L. J. Ch. 6.

notice of the deposit of the certificates should be given to the company, to prevent the shareholder from obtaining fresh certificates by perjury or fraud, and to do away with the inference of reputed ownership in case of the bankruptcy of the depositor in whose name the shares are registered, and so prevent the title to the shares from vesting in his trustee.

The fact that the company is not bound to take notice of any trust will not render a notice to them of the deposit of the certificates by way of security for a loan, nugatory, and will not prevent a deposit of the certificates of proprietorship by way of security for a loan from constituting a valid charge upon the shares. (*g*)

Where a sister advanced her brother £1800 on the security of a deposit of mining shares belonging to the brother, and received the certificates of the shares, together with an undertaking, signed by the brother to complete the transfer of the shares to the petitioner when required, and placed the certificates and the undertaking in an inclosure which she sealed with her seal, and then deposited it in an iron safe belonging to her brother, for greater security, it was held that the certificates were not in his possession, order, or disposition at all. He had certainly the custody of the packet, but could not lawfully have broken the seal to get at the contents. (*h*)

(*g*) Stewart, *ex parte*, *supra*, explaining and qualifying Boulton, *ex parte*, 1 De G. & J. 763. (*h*) *Ex parte* Richardson, 3 Deac 503.

CHAPTER V.

OF CONTRACTS OF INDEMNITY.

SECTION I.

PRINCIPAL AND SURETY.

IIII. *Of the contract of suretyship.*—The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person, who is himself primarily responsible for the payment of such debt, or the performance of the act or duty. To the contract and engagement of suretyship it is essential that there be a principal or third party primarily liable; for there can be no accessory without a principal. (a) If, therefore, no contract has been entered into with the third party on whose account the covenantor or promisor professes to act as surety, no liability attaches to the latter, as he can not be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety. From the terms and language of some contracts, a doubt frequently arises as to whether the contract is the contract of a surety coming in aid only of a principal debtor or contractor, and undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal and sole contracting party stipulating for some benefit or

(a) Pothier (OBL.), No. 446–449. Inst. lib. 3, tit. 21, § 5.

advantage for a third party, who is not bound by the contract, and on whom no liability whatever attaches.

(*b*) When a man, wishing to procure credit for his friend, writes a letter to a shopkeeper requesting him to supply such friend with goods, saying, "If he does not pay you, I will," the undertaking is the undertaking of a surety. If he says, "I will be answerable," or "I will see you paid," the expressions are equivocal; and then we ought to look at the surrounding circumstances to see what the contract really was. (*c*) If, upon examination of those circumstances, it should appear that the party to whom the goods have been furnished has been treated as the debtor and principal contracting party, as, for example, if the credit has been given to him in the tradesman's books, and he has been applied to for payment, then the promisor can only be made liable as a surety after default on the part of such debtor and principal contracting party. If the promisor is himself interested in the subject-matter of the promise or the transaction to which it relates, he will stand in the position of a principal contracting party. (*d*) But, where B verbally promised that, if M would supply C with iron, and take C's acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and that M could not recover against B on his refusing to discount the acceptances. (*e*)

1112. Authentication of guarantees.—According to the Roman civil law, the engagement of a surety could only be contracted by stipulation. By our own common law it might be contracted orally; but the

(*b*) *Ante* Spark v. Heslop, 28 L. J., Q. B. 197; 1 El. & El. 563.

(*c*) BAYLEY, B., Simpson v. Penton 2 Cr. & M. 433.

(*d*) Fitzgerald v. Drossler, 5 Jur., N. S., 598; 29 L. J., C. P. 113.

(*e*) Mallett v. Bateman, L. R., 1 C. P. 163; 35 L. J., C. P. 40.

legislature has thought fit to require the engagement to be authenticated by writing; and it has been enacted as previously mentioned, by the fourth section of the Statute of Frauds¹ that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. Formerly, if the guarantee or undertaking was made by simple contract or by writing not under seal, the cause or consideration for the promise, as well as the promise itself, must have been disclosed upon the face of the writing; but, by the 19 & 20 Vict. c. 97, s. 3, no special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. But parol evidence is not admissible to explain the promise; and, therefore, the whole promise must be in writing, or the memorandum will be insufficient. (*f*) If the writing is so vague and uncertain that the nature and extent of the undertaking and liability can not be made out from the terms of the instrument, it will not constitute a

(*f*) *Holmes v. Mitchell*, 7 C. B., N. S., 361; 28 L. J., C. P. 301.

¹ *Ante*,

sufficient memorandum of the promise. (*g*) If, therefore, the name of the principal intended to be guaranteed is left out or left in blank, there is no sufficient memorandum of the contract. (*h*)

The Statute of Frauds, as we have seen, does not apply to the case where the party giving the guarantee is himself liable to the demand which he is purporting to guarantee. The debt must be exclusively the debt, default, or miscarriage of another to bring it within the statute. (*i*)

1113. *Primary and secondary liabilities.*—When money is advanced, or goods are supplied, to a principal debtor, on the security of a joint and several covenant, or a joint and several promissory note, executed by the principal debtor and his sureties, for the repayment of the money advanced or the due payment of the price of the goods, all the co-covenantors or co-premisors are primarily liable on the face of the instrument, and are bound to see that the money is paid on the day appointed for payment, so that, if default is made, they may be at once sued upon the instrument. Formerly, when two or more persons signed a joint and several promissory note as principals, it was not allowed, at common law, to modify the effect of the contract by showing that one of them signed only as surety for the other; but now the fact may be pleaded and given in evidence for the purpose of giving the party so signing the equitable rights of a surety, but not for the purpose of establishing a different contract from that evidenced by the writing, such as that a party who has contracted a primary obligation on the face of the contract was not

(*g*) *Holmes v. Mitchell*, *ante*.

(*i*) *Orrell v. Coppock*, 26 L. J., Ch.

(*h*) *Williams v. Lake*, 2 El. & El. 269. *Ante*.

intended to be primarily liable, but had agreed only to be secondarily liable after the default of another joint contractor. (*k*)

III4. *Of the statement of the consideration on the face of a guarantee.*—We have already seen that a by gone transaction can not be made a good consideration for a promise; but, if there is a valid consideration in point of fact, the mere statement of it in the past tense on the face of a guarantee will not invalidate the contract. The consideration, if disclosed, need not be expressed in words of form, or with technical accuracy. (*l*) The contract must be interpreted in connection with surrounding circumstances, in order to ascertain whether it was intended to apply to past or to future transactions; and, in case of doubt and ambiguity, it would seem that parol evidence is admissible to show that the parties meant, not a past, but a future transaction; (*m*) and the courts will lean in favor of such a construction as will uphold and maintain the contract rather than render it nugatory and of no effect. (*n*) Thus, where the defendant gave to the plaintiffs the following guarantee: "As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account," it was held that the expression "for goods supplied" did not necessarily import a past transaction, and ought to be read "for goods to

(*k*) *Pooley v. Harradine*, 7 Ell. & Bl. 431. *Greenough v. McClelland*, 2 Ell. & Bl. 424; 30 L. J., Q. B. 15. *Manley v. Boycott*, 2 Ell. & Bl. 46; 22 L. J., Q. B. 265. *Mutual Loan Fund, &c., v. Sudlow*, 5 C. B., N. S., 453; 28 L. J., C. P. 108. *Lawrence v. Walmsley*, 12 C. B., N. S., 809; 31 L. J., C. P. 143

(*l*) *Pace v. Marsh*, 8 Moore, 59. *Boehm v. Campbell*, 3 Moore, 15. *Oldershaw v. King*, 2 H. & N. 519; 27 L. J., Ex. 120.

(*m*) *Hoad v. Grace*, 7 H. & N. 794; 31 L. J., Ex. 98.

(*n*) *Broom v. Batchelor*, 1 H. & N. 263; 25 L. J., Ex. 299.

be supplied." (o) If the consideration was a future valid consideration, and not a past transaction, the guarantee will be upheld as a valid instrument. (p) But, if there are no future advances, and the instrument, construed in connection with surrounding circumstances, does not show a future consideration, but refers altogether to a past transaction, it is invalid. (q) If there is any consideration for a guarantee, the court will not take notice of its inadequacy. (r) An indorsement on a contract of a guarantee or undertaking for the faithful performance of the contract by one of the contracting parties may be read in connection with the contract, in order to ascertain and establish the consideration. (s)

III5. *Proposals and offers to guarantee not amounting to a concluded contract.*—Care must be taken in all cases to mark the distinction between a consummate and perfect guarantee, and a mere proposal, or offer, or tender of a guarantee, which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained, ere it can become a perfect and concluded contract. Where the defendant wrote a letter to the plaintiffs to the following effect: "Gentlemen,—As I understand Messrs. Anderson and Co. have given you an order for rigging, &c., which will amount to about £4,000, I can assure you, from what I know of their honor and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no

(o) Hood v. Grace, 7 H. & N. 494 ;
31 L. J., Ex. 98.

(p) Bainbridge v. Wade, 16 Q. B.
99 ; 20 L. J., Q. B. 7. Steele v. Hoe,
19 Ib. 89. Edwards v. Jevons, Ib., C.,
P. 50 ; 8 C. B. 436. Colbourn v. Daw-
son, 20 L. J., C. P. 154 ; 10 C. B. 773.
Brooks v. Haigh, 10 Ad. & E. 334.

(q) Bell v. Welch, 9 C. B. 168 ; 19
L. J., C. P. 184. Allnutt v. Ashenden,
6 Sc. N. R. 133. Westhead v. Spro-
son, 30 L. J., Ex. 265 ; 6 H. & N.
728.

(r) Dutchman v. Tooth, 7 Sc. 710.

(s) Coldham v. Showler, 3 C. B.
312.

objection to guarantee you against any loss from giving them this credit;" and this letter was given by the defendant to Anderson and Co., who handed it over to the plaintiffs, and the latter thereupon furnished the rigging and other articles, and, being unable to procure payment from Anderson and Co. brought an action against the defendant, it was held that the letter did not import a perfect and conclusive guarantee, but only a proposition tending to a guarantee; that it was a mere overture or offer; and, that if the plaintiffs had accepted it, and intended to treat it as a guarantee, they ought to have given notice to the defendant. (t) So, where an action was brought upon a letter addressed to the plaintiffs in the following terms: "Gentlemen,—Mr. France informs me that you are about publishing an arithmetic for him and another person; and I have no objection to being answerable as far as £50. For my reference, apply to Messrs. Brooke and Co. of this place:" which letter had been signed by the defendant, and given to Mr. Brooke, and forwarded by him to the plaintiffs, who proceeded with the publication without ever communicating with the defendant, it was held that the transaction "could not be tortured into a consummate and perfect contract;" that it was a mere offer or proposal, requiring an answer; and that, as the plaintiffs had not communicated their acceptance of it to the defendant before they proceeded to act upon it, they could not treat it as an absolute and conclusive engagement, capable of sustaining an action. (u)

If references are required from, and given by an intended surety, and the creditor means to dis-

(t) *M'Iver v. Richardson*, 1 M. & S. 557.

(u) *Mozley v. Tinkler*, 1 C. M. & R. 692.

pense with the references, and act upon the guarantee without them, he is bound to give notice to the surety of the intended renunciation before he acts upon the guarantee. (x)

III 16. *Conditions precedent.*—When the liability of the surety attaches only on the happening of some precedent act or event, it must be fully established that the event has happened. (y)

III 17. *Bonds to secure faithful services.*—If the surety has bound himself by a penal obligation under seal for the performance of some contract, act, or duty, by his principal, and the time for which the surety is to be bound is marked out in the recitals or condition, it can not afterwards be extended by any general words. If the recital sets forth the appointment of the party, on whose behalf the surety consents to become bound, to some office or employment, and the condition of the bond is for the good conduct and faithful service of the party in such office or employment the liability of the surety will be co-extensive with the duration of the office; if the office is an annual office, the liability will not extend beyond the current year of office; (z) if it is a fixed and permanent employment for the life of such party, the liability of the surety will continue during the whole of the life of the latter; if, on the other hand, the duration is uncertain, as for instance, if it is holden at the will of the employer, the liability will be as indefinite and uncertain as the time of the employment. (a) Moreover, if a bond is given to secure the faithful services of the principal in one office or employment at a specified salary, it will not

(x) *Morten v. Marshall*, 2 H. & C. 305; 33 L. J., Ex. 54.

(y) *Moor v. Roberts*, 5 C. B., N. S., 841.

(z) *Mayor, &c., of Cambridge v. Dennis*, 27 L. J., Q. B. 474.

(a) *Mayor of Dartmouth v. Silly*, 7 Ell. & Bl. 97; 26 L. J., Q. B. 90.

extend to a different office or employment at the same salary, or to the same office at a different and reduced salary; (*b*) and a surety who becomes responsible for the good conduct of his principal as a clerk, will not be bound for him if he is afterwards employed as "a manager." (*c*) But there must be a substantial change in the office or employment, or the surety will not get rid of his liability. (*d*) In an action upon a bond to secure the faithful service of a deputy-postmaster, it appeared by the recitals of the bond that the postmaster-general had deputed Jenkins to be deputy-postmaster "for the term of six months following," and the condition was that Jenkins should, during all the time he continued deputy-postmaster, faithfully and diligently perform and execute the duties of the office; and it was held that the liability of the surety was restricted to the six months specified in the recitals. (*e*) And although the recital of a bond, setting forth the appointment of the principal to a certain office or employment, does not state the nature or duration of the office, or in any way limit the period of the service for the honest and faithful performance of which the surety binds himself, yet if the office is in point of fact an annual office, and there is a fresh deputation and appointment each year, the surety is only answerable for the execution of the duty for the current year. (*f*)¹

(*b*) *North-West. Rail. Co. v. Whinray*, 10 Exch. 77; 23 L. J., Ex. 261. *Holland v. Lea*, 9 Exch. 430. *Frank v. Edwards*, 8 Exch. 220; 22 L. J., Ex. 42.

(*c*) *Anderson v. Thornton*, 3 Q. B. 276. *Whicher v. Hall*, 5 B. & C. 276.

(*d*) *Portsea Isl. Un. (Guard.) v.*

Whillier, 29 L. J., Q. B. 150, 2 El. & El. 755.

(*e*) *Arlington v. Myrick*, 2 Wms. Saund. 411, a. *Stroughton v. Day*, Al. 10; Sty. 18. *Bamford v. Iles*, 3 Exch. 380. *Liv. Water Co. v. Atkinson*, 6 East, 512.

(*f*) *Hassell v. Long*, 1 M. & S. 363

Peppin v. Cooper, 2 B. & Ald. 431

¹ See next note.

1118. *Extent and duration of the liability of the surety.*—If the surety by express words plainly manifests an intention to be bound for the faithful service and good conduct of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will continue in force as long as the obligee may think fit to continue the employment. (*g*) Thus, where a bond reciting the appointment of the principal to an office was conditioned for the due fulfillment by him of the duties thereof, “during such time as he shall continue in the said office, whether by virtue of his said appointment, or of any re-appointment thereto,” it was held that the obligation was not confined to the current year of office, but extended to all subsequent years during which the party was continually re-appointed. (*h*) And the surety may, by the terms of an express contract under seal, render himself responsible for past, present, and future receipts and payments, and preceding debts and defaults, as well as those that are to come. (*i*) And, if the duration of the office or employment to which the party is stated to have been appointed is indefinite and uncertain—if, for example, it is held or continues *durante bene placito*, and there is nothing in the language of the recital or of the condition directly or indirectly limiting the period of liability, the extent and duration of the obligation of the surety are then as indefinite and uncertain as the period of employment, and will continue as long as

Wardens of St. Saviour's v. Bostock, 2 B. & P., N. R. 180. Leadly v. Evans, 9 Moore, 102. Lond. Ass. Co. v. Bold, 6 Q. B. 526. Cambridge, Mayor, &c., v. Dennis, 27 L. J., Q. B. 475.

(*g*) Berwick, Mayor of, v. Oswald, 3 Ell. & Bl. 653. Oswald v. Berwick, &c., 5 H. L. C. 856.

(*h*) Augero v. Keen, 1 M. & W. 390.

(*i*) Saunders v. Taylor, 9 B. & C. 35, 41.

the employment lasts, though it should be for the whole life of the principal or party employed. (*j*)¹

III 9. *Release of the surety.*—The civil and continental laws enable the surety, when no time at all is marked out by the contract for the termination of his liability, to release himself by process of law after a reasonable period from the time of the making of the contract. (*k*) In our own law, the surety has no such means of discharging himself from the liability he has voluntarily undertaken; (*l*) and the courts, therefore, in all cases, construe doubtful contracts of suretyship (when they are under seal, and the surety has no power of revoking them) in favor of the surety, so as to narrow rather than enlarge his liability.

(*j*) *Curling v. Chalklen*, 3 M. & S. 509; *M'Gahey v. Alston*, 1 M. & W. 386.

(*l*) But see as to this, *Burgess v. Eve*, L. R., 13 Eq. 450; 41 L. J., Ch. 515. *Phillips v. Foxhall*, L. R., 7 Q.

(*k*) *Pothier (OBLIGATIONS)*, Nos. B. 666; 41 L. J., Q. B. 293. 442, 443.

¹ But the obligation of the surety does not extend beyond the time first stipulated for, although the officer be re-appointed. *Welsh v. Seymour*, 28 Conn. 387; *Hollman v. Langdon*, 7 Jones L. (N. C.) 49; *Brown v. Lattimore*, 17 Cal. 93; *State Tréas. v. Mann*, 34 Vt. (5 Shaw) 371; *Collyer v. Higgins*, 1 Duvall (Ky.) 6; *Lexington, &c., R. R. Co. v. Elwell*, 8 Allen (Mass.) 371; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; but *Thompson v. State* (37 Miss. [8 George] 518) holds, that where the law provides that an officer shall hold until his successor shall qualify, his bond covers his acts so long as he holds. Where an officer was appointed "for one year, and until another is appointed in his stead," held that his surety was liable only during the first year of his office, notwithstanding the officer was appointed from year to year, and gave no new bond. *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. (N. Y.) 196; but see *Placer County v. Dickerson* (45 Cal. 12), which holds that the sureties of a county treasurer are liable for money received by him as treasurer, after the expiration of his term, so long as he remains in possession of the office, and until he delivers it over to his successor; and to the same effect, *United States v. Truesdell*, 2 Biss. 78

1120. *Discharge of the surety by a change in the service or employment of the principal.*—In the case of a guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is part of the essence of the contract with the surety, so that, if it be altered, the surety is discharged ; (*m*) but, if the course of dealing is left to the option of the plaintiffs entirely, or within certain limits, the surety can not then complain of a variation to which he has agreed. (*n*) Where there is a bond of suretyship for the faithful execution of the duties of a public office, and, by the act of the parties or by act of parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. (*o*) But, where a principal is appointed to two distinct employments, and his sureties guarantee by one bond his good conduct in both, they are not discharged from liability as to one of the employments by the fact of his duties being altered and enlarged in the other, or as to either by the fact that an additional and distinct office is undertaken. (*p*) Where the condition of a bond was that a clerk should account for and pay over to the obligee, his executors or administrators, all moneys, bills, &c., which he should receive in the course of his employment as clerk to the obligee, it was held that the liability of the surety ceased with the death of the obligee, and could not be extended to a new employment by the executors. (*q*) And, where the condition of the

(*m*) *Arlington (Lord) v. Meyriske*, 2 Saund. 403.

(*n*) *Stewart v. M'Kean*, 10 Exch. 689 ; 24 L. J., Ex. 145.

(*o*) *Pybus v. Gibb*, 6 Ell. & Bl. 911 ; 26 L. J., Q. B. 41.

(*p*) *Skillett v. Fletcher*, L. R., 1 C. P. 217 ; *Ib.* 2, C. P. 469 ; 35 L. J., C. P. 154 ; 36 L. J., C. P. 206.

(*q*) *Barker v. Parker*, 1 T. R. 287,

295.

bond was that a clerk should, during the time he continued in the service of the plaintiff, faithfully account for and pay over all moneys which he should receive belonging to the plaintiff, and the breach assigned was the non-payment by the clerk of money which he had received on account of the plaintiff and his partner, it was held that this was beyond the scope of the defendant's engagement. (r)¹

1121. *Bonds and guarantees under seal of partnerships and associations.*—If a bond be given to secure the faithful services of a clerk to a firm in partnership, or the repayment of advances made by the firm, and any change takes place in the constitution of the copartnership, either by the death or retirement of existing partners, or the accession of new partners, the contract of suretyship is at an end, unless it appears to have been the intention of the contracting parties that the security should be a continuing security, and should remain in force throughout all changes in the co-partnership. (s) This was held to be the case where a bond was given by a surety to the several partners of a banking house nominatim to secure the repayment to them, "or either of them," of advances to be made "by them"

(r) Wright v. Russell, 3 Wils. 530; 52. Chapman v. Beckington, 3 Q. B. 2 W. Bl. 934. Napier v. Bruce, 8 Cl. 703. Lond. Ass. Co. v. Bold, 6 Ib. & Fin. 470. Montefiore v. Lloyd, 15 524. Mills v. Guard., &c., 18 L. J., Ex. 252. Montefiore v. Lloyd, 15 C. B., C. B., N. S., 203; 33 L. J., C. P. 49. N. S., 203; 33 L. J., C. P. 49. Barclay v. Lucas, 3 Doug. 321.

¹ But an alteration, addition, or diminution of the duties of a public officer made by the legislature, will not discharge his official bond or the sureties thereon, so long as the duties required are the appropriate functions of his office. People v. Vilas, 36 N. Y. 549; and see Miller v. Stewart, 9 Wheat. 680; United States v. Hillegas, 3 Nash C. C. 70; Postmaster-General v. Reeder, 4 Id. 678; United States v. Tilotson, 1 Paine C. C. 308

to the principal. (*t*) This principle of construction, narrowing the liability of the surety, applies with still greater force in the case of bonds conditioned for the repayment of advances to be made to a firm, or to either of the partners. Where, therefore, a surety becomes bound for the re-payment of advances made to two persons in partnership, or to either of them and one dies, the liability of the surety will not extend to advances made to the survivor. (*u*) If the liability of the surety is intended to continue after the retirement as well as the death of one of several persons in partnership, such intention must be manifested with a precision not to be mistaken. (*x*) By the 19 & 20 Vict. c. 97, s. 4, which is simply an affirmance of the law as it previously stood, (*y*) it is enacted, that no promise to answer for the debt, default, or miscarriage of another made to a firm, and no promise to answer for the debt, default, or miscarriage of a firm shall be binding on the person making the promise in respect of anything done, or omitted to be done, after a change in any one or more of the persons constituting the firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change, shall appear, either by express stipulation or by necessary implication. (*z*)

II22. *Limitation of the liability of the surety.*

—If a bond or guarantee is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed in the whole at any one time a certain limited amount,

(*t*) *Strange v. Lee*, 3 East, 489. *W. 580, 586. Backhouse v. Hall*, 6 Weston v. Barton, 4 Taunt. 673. B. & S. 507; 34 L. J., Q. B. 141.

Dance v. Girdler, 4 B. & P. 34. (*y*) *Backhouse v. Hall*, 6 B. & S.

(*u*) *Simson v. Cooke*, 8 Moore, 507; 34 L. J., Q. B. 141.

605. (*z*) *Myers v. Edge*, 7 T. R. 424

(*x*) *Un. Camb. v. Baldwin* 5 M. & Dry v. Davy, 10 Ad. & E. 30.

the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it, (*a*) unless that clearly appears to have been the intention of the parties. (*b*) A guarantee to secure moneys to be advanced to a third party on discount, "for the space of twelve calendar months," is countermandable within that time, although some bills may have been discounted and repaid before notice. (*c*)

1123. *Continuing liabilities.*—Where a bond given by the defendant as surety, recited that the plaintiffs had agreed to advance to the principal "any sums of money not exceeding, at any one or more time or times, the sum of £200, in the whole," and the bond was conditioned for the payment by the defendant as surety, of "all and every such sum or sums of money, not exceeding the sum of £200. as aforesaid," as the plaintiffs should advance, it was held that this bond was a continuing or standing security, not confined to the first £200 advanced, but extending to all future advances and payments that might at any time be made by the plaintiffs. (*d*) The courts, however, in the case of contracts of suretyship under seal, lean in favor of a construction limiting the liability of the surety to some particular supply or advance, so as to confine it within an ascertained definite limit, rather than extending it to a general and continuous supply, creating an indefinite liability, from which the surety might have no means of relieving himself during the whole life of the principal. (*e*) In

(*a*) *Seller v. Jones*, 16 M. & W. 112. *Gee v. Pack*, 33 L. J., Q. B. 49. *Backhouse v. Hall*, 6 B. & S. 507. 34 L. J., Q. B. 141.

(*b*) *Parker v. Wise*, 6 M. & S. 246. *Gordon v. Rae*, 8 Ell. & Bl. 1087.

(*c*) *Offord v. Davis*, 12 C. B., N. S., 748; 31 L. J., C. P. 319.

(*d*) *Batson v. Spearman*, 6 Ad. & E 298.

(*e*) *Kirby v. Duke of Marlborough*, 2 M. & S. 22.

the case of simple contracts, on the other hand, no such leaning is found. Thus, where the defendant gave to the plaintiff a guarantee for the payment of "any goods he hath or may supply W. P. to the amount of £100," it was held that the guarantee was a continuing or standing guarantee, extending to all supplies of goods at any time furnished, so long as the parties continued to deal together. (*f*) So, where the guarantee was, "In consideration of your supplying my nephew with earthenware and china, I hereby guarantee the payment of any bills you may draw upon him on account thereof to the amount of £200," it was held to be a continuing guarantee, remaining as a standing security to the amount specified, so long as the supply of earthenware lasted. (*g*) From a continued liability under seal the surety has no means of escape at common law; he can not recall the bond, covenant, or obligation that he has entered into, and say that he will be no longer responsible for advances or supplies to the principal, unless in the contract of suretyship he has expressly reserved to himself such a power; (*h*) and his liability may be prolonged indefinitely, and for the whole life of the principal. But, in the case of simple contracts, the surety (though liable for all advances and supplies that have been made on the faith of his promise) may at any time revoke such promise, and discharge himself from the future and continuing liability by giving notice to that effect.

The following guarantees have been held to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business not to exceed £100." (*i*) "I undertake to be

(*f*) *Mason v. Pritchard*, 12 East. 227.

(*g*) *Mayer v. Isaac*, 6 M. & W. 612.

Hitchcock v. Humphrey, 6 Sc. N. R. 540.

Hobbs v. Carpenter, 27 L. J., C. P. 1.

(*h*) *Hassell v. Long*, 2 M. & S. 370

Calvert v. Gordon, 1 M. & R. 497

3 M. & R. 124.

(*i*) *Merle v. Wells*, 2 Campb. 413.

answerable to the extent of £100 for any tallow supplied by you to A. B.” (*k*) “I hereby agree to guarantee the payment of goods to be delivered in umbrellas to S. & Co., according to the custom of their trading with you in the sum of £200.” (*l*) “As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby undertake to guarantee you in a sum of £100, payable to you in default on the part of the said W. C. for two months;” (*m*) “In consideration of your agreeing to supply goods to K., we agree to guarantee any future debt with you to the amount of £600;” (*n*) “In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of £100; and, in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing to an amount not exceeding the sum of £100.” (*o*)

II24. *Guarantees not importing a continuing liability.*—The following guarantees have, on the other hand, been held to limit the liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as supplies or advances to the amount named have been made, and paid for or satisfied by the principal: “I engage to guarantee the payment of A. M. to the extent of £60 at quarterly account, bill two months, for goods

(*k*) *Bastow v. Bennett*, 3 Campb. 220.

(*l*) *Hargrave v. Smee*, 3 M. & P. 573.

(*m*) *Allan v. Kenning*, 2 M. & S. 768.

(*n*) *Martin v. Wright*, 6 Q. B. 917.

(*o*) *Wood v. Priestner*, L. R., 2 Ex. 66, 282; 36 L. J., Ex. 42, 127. See for other cases of continuing guarantees,

Heffield v. Meadows, L. R., 4 C. P. 595; 38 L. J., C. P. 290. *Laurie v. Scholefield*, L. R., 4 C. P. 622; 39 L. J., C. P. 63. *Coles v. Pack*, L. R., 5 C. P. 65. *Nottingham Hide, Skin, and Fat Market Co. v. Bottril*, L. R., 8 C. P. 694; 42 L. J., C. P. 256.

to be purchased by him of you;" (*p*) "I agree to be answerable to K. for the amount of five sacks of flour to be delivered to W. P., payable in one month;" (*q*) "I agree to be answerable for the amount of £50, for T. L., in case he does not pay for the gin he receives from you." (*r*) Where the guarantee was, "In consideration of your supplying Mr. S. with goods to the extent of £100, I undertake to pay you if he does not," it was held that the liability of the surety was dependent upon credit to the amount of £100 being given if required, but that, if the debtor did not demand £100 worth of goods, the surety would be liable for whatever was supplied. (*s*) But, where the surety guarantees only the payment of one sum in solido, provided goods to the amount guaranteed are furnished, there is no cause of action against the surety until the full amount has been supplied. (*t*)

1125. *Conditions precedent to the liability of the surety.*—If the continued liability of the surety is made dependent upon the observance of certain terms and conditions by the creditor, these terms must be strictly obeyed, or the surety will be discharged. (*u*) Therefore, where the creditor took a warrant of attorney from the principal debtor with a stipulation for the benefit of the surety that, on notice from the latter, the creditor should enter up judgment and levy execution upon the warrant of attorney, and apply the proceeds in reduction of the debt, and the creditor neglected to file the warrant of attorney, and to keep it

(*p*) *Melville v. Hayden*, 3 B. & Ald. 593.

(*q*) *Kay v. Groves*, 6 Bing. 276.

(*r*) *Nicholson v. Paget*, 1 C. & M. 48.

(*s*) *Dimmock v. Sturla*, 14 M. & W. 758, 15 L. J., Ex. 65.

(*t*) *Johnson v. Gandy*, 26 Law T. R. 72.

(*u*) *Watts v. Shuttleworth*, 5 H. & N. 235. *Lawrence v. Walmsley*, 12 C. B., N. S., 808; 31 L. J., C. P. 143.

up as an efficient security, it was held that the security was discharged. (*x*) Where a party has consented to be co-surety with another, he can not be made responsible if the other party refuses or neglects to be bound. Where, therefore, one of two intended co-sureties executed a deed of covenant for the re-payment of advances to be made to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety, and the deed never was executed by the other surety, it was held that the executing surety was entitled in equity to be discharged from every part of the debt. (*y*) But a surety, who has executed a bond on the faith of its being executed by the principal debtor also, can not be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his. (*z*)

II26. *Duty of the person guaranteed.*—Where the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. (*a*) Thus, in the case of bonds and guarantees given to an employer to secure the faithful services of a clerk or servant in his employment, the surety has a right to expect from the employer that he will call upon such clerk or servant to account in the ordinary course of business, and that he will not

(*x*) *Watson v. Alcock*, 22 L. J., Ch. 858; 17 Jur. 853.

(*y*) *Evans v. Brembridge*, 8 D. M. & G. 100; 25 L. J., Ch. 334. *Bonser v. Cox*, 4 Beav. 379.

(*z*) *Cooper v. Evans*, L. R., 4 Eq 45; 36 L. J., Ch. 431.

(*a*) *Watts v. Shuttleworth*, 29 L. J. Ex. 234; 5 H. & N. 235

trust him beyond the bounds of ordinary prudence. (*b*) But the mere passive inactivity of the principal to whom a guarantee has been given, or his neglect to call the principal debtor to account, and to enforce payment against him, do not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to imply connivance, and amount to fraud. The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty. (*c*) If, however, the master discovers that the person employed has been guilty of dishonesty, he must inform the surety, who has thereupon a right to withdraw from his guarantee (*d*); and, if he omits so to do, the surety will be discharged so far as subsequent acts of dishonesty are concerned. (*e*)

1127. *Alteration of the principal obligation discharging the surety.*—If a new contract is substituted in the place of the original contract, or if the original contract is altered in any material point without the surety's knowledge or consent, so as to constitute a new agreement varying substantially from the former, the surety is no longer bound. (*f*) But, where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent, does not

(*b*) *Smith v. Bank of Scotland*, 1 Dow. 292.

(*c*) *Black v. Ottoman Bank*, 15 Moo., P. C. 472.

(*d*) *Burgess v. Eve*, L. R., 13 Eq. 450; 41 L. J., Ch. 515.

(*e*) *Phillips v. Foxhall*, L. R., 7 Q. B., 666; 41 L. J., Q. B. 293. *Sanderson v. Aston*, L. R., 8 Ex. 73; 42 L. J., Ex. 64.

(*f*) *Gardner v. Welsh*, 24 L. J., Q. B. 284, overruling *Catton v. Simpson* 8 Ad. & E. 136.

release the surety from his contract of suretyship as to the other. (*g*) Where the defendant had as surety signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it, and afterwards the payee, without the knowledge of the defendant, induced another person to sign it in order to strengthen the security, it was held that the defendant was discharged from liability. (*h*) If the guarantee is a guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiff, that course of dealing is part of the agreement of the plaintiff with the surety, and the plaintiff can not alter it and keep the surety liable. But, when the course of dealing is left to the option of the plaintiff altogether, or within certain limits, and is allowed by the contract, the surety can not complain of an alteration which he has himself permitted.¹ If a man becomes surety for the payment of a debt secured by the bond of the debtor, payable at a given day, and the creditor before the day of payment has arrived, by an indorsement under seal on the bond, extends the time of payment, this is a material variation, amounting to the substitution of a new engagement in the place of the original contract, for the performance of which the surety is not bound. (*i*)²

(*g*) *Harrison v. Seymour*, L. R., 1 239. *Gen. St. Nav. Co. v. Rolt*, 6 C. P. 518; 35 L. J. C. P. 264. C. B., N. S., 550.

(*h*) *Whitcher v. Hall*, 5 B. & C. 276. (*i*) *Rees v. Berrington*, 2 Ves Bonar v. Macdonald, 3 H. L. C. 542.

¹ *Ante*, p. 138.

² See *ante*, note, 1, p. 131. Although an amendment neither increasing nor diminishing their liability, will not discharge the sureties to the usual bond given on release of a vessel seized by process of admiralty. *Newell v. Norton and Ship*, 3 Wallace (U. S.) 357; and see *Giles v. Crosby*, 5 Bosw. (N.

1128. *Extension of the time of payment.*—Any enlargement of the time of payment by a binding contract with the principal debtor which ties up the

Y.) 389; *Miller v. Stewart*, 9 Wheat. 680; *Vose v. Florida R. Co.*, 50 N. Y. 369; and cases cited in note-†, page 385. But a verbal agreement modifying a written guaranty is not good, nor can the surety show such in defense; though it seems, that if the verbal agreement be accepted by the creditor, this might operate to discharge the surety. *Brady v. Peiper*, 1 Hilton (N. Y.) 61. A surety will not be discharged by usury; *Mount v. Tappey*, 7 Bush. 617; nor by an agreement to receive a less sum than that stipulated for, when there is no other change in the agreement; *Ellis v. McCormick*, 1 Hilton (N. Y.) 313; and see *Hunt v. Knox*, 34 Miss. 655. As to variation in the subject-matter of the guaranty, see *United States v. Corwine*, 1 Bond, 339; *Grant v. Smith*, 46 N. Y. 93; *Hanson v. Crawley*, 41 Ga. 303; *Ruble v. Norman*, 7 Bush. (Ky.) 582; *Fasnacht v. Winkelman*, 21 La. Ann. 727. So merely taking a new security from a debtor without agreeing to give him time, will not discharge a surety. *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; affirming *S. C.*, 3 Paige (N. Y.) 614; *Elwood v. Diefendorf*, 5 Barb. (N. Y.) 398; *Williams v. Townshend*, 1 Bosw. (N. Y.) 411; and see generally, *Hubbell v. Carpenter*, 1 Seld. 171; *Pitts v. Congden*, 2 Comst. (N. Y.) 352; *Bangs v. Strong*, 7 Hill (N. Y.) 250; *Fox v. Parker*, 44 Barb. 541; *East River Bank v. Kennedy*, 9 Bosw. (N. Y.) 513. The supreme court of the United States have taken very strong ground upon the question of the discharge of a surety, holding that he is discharged, not only by payment by or release of his principal, but by any material change in the relations between the principal and the creditor. It is not enough to show that the change was not injurious to the surety. The surety has a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the exact terms of his contract. *Postmaster General v. Reeder*, 4 Wash. C. C. 678; *U. S. v. Hillegas*, 3 Id. 70; *Miller v. Stewart*, 9 Wheat. 680; *U. S. v. Tillotson*, 1 Paine, C. C. 304. So also in *Mayhew v. Boyd* (5 Md. 102), the court said that any dealings with the principal debtor by the creditor, which amount to a departure from the contract binding a surety, and which by possibility might materially vary or enlarge such surety's liability without his consent, will discharge him. But a surety is not discharged from his liability by reason of a contract

hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, if it has been made without his assent or authority, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated. (*k*) As soon as the principal debtor has made default, the surety has a right to step in and pay the debt, and require the creditor to sue, or allow him to sue, the principal in his, the creditor's name; and, if the creditor has voluntarily placed himself in such a position as to be compelled to say he can not sue the principal debtor, he thereby discharges the surety. (*l*) But a contract with a stranger to give time to the principal debtor, which contract does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge such surety from liability; (*m*) and it must be proved that there was either a new security given to extend the time of payment or a binding agreement upon sufficient consideration to suspend the remedy. (*n*)

There is no obligation of active diligence against the principal debtor on the part of the creditor. It is the business of the surety to see that the principal

(*k*) *Combe v. Woolfe*, 8 Bing. 162; 1 M. & Sc. 241. *Eyre v. Bartrop*, 3 Mad. 221. *Nisbet v. Smith*, 2 Br. C. C. 578. As to guarantees authorizing the giving time to the principal debtor, see *Cowper v. Smith*, 4 M. & W. 519. *Un. Bank of Manch. v. Beech*, 3 H. & C., 672; 34 L. J., Ex. 133.

(*l*) *WILLIAMS, J., Strong v. Foster*,

17 C. B. 219. *Bailey v. Edwards*, 34 L. J., Q. B. 45; 4 B. & S. 761. *The Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R. 7 Ch. 142; 41 L. J., Ch. 332.

(*m*) *Frazer v. Jordan*, 8 Ell. & Bl. 312.

(*n*) *PARKE, B., Moss v. Hall*, 5 Exch. 50. *Bingham v. Corbitt*, 34 L. J., Q. B. 37.

made with his assent between the principal debtor and the creditor. *Wright v. Storrs*, 6 Bosw. (N. Y.) 600; *Carlies v Estes*, 31 Vt. (2 Shaw) 653; *Adams v. Way*, 32 Conn. 160.

pays, not that of the creditor. (o) A mere promise, therefore, without consideration, not to sue the principal debtor for a certain time will not discharge the surety, (p) nor mere laches or forbearance, nor an omission on the part of the creditor, promisee, or obligee, to press the debtor or party liable, and sue him for the money, without any suspension of the legal remedies. (q) Nor will a parol agreement to enlarge the time of payment discharge the surety, when the principal obligation is under seal, inasmuch as such parol agreement can not in any way alter or affect the legal operation of the deed, or restrict or suspend the right of action thereon; neither will the acceptance by the creditor of a collateral security from the principal debtor operate as a discharge of the surety, if the position of the latter has in nowise been altered or varied thereby; (r) nor will the surety be discharged if he himself has assented to the alteration of the principal obligation. In the case of an accommodation bill, known to be such to all the parties, the acceptor can only be considered a surety for the drawer, so that, if time be given to the drawer by a binding agreement, without the knowledge and concurrence of the acceptor, the acceptor is discharged. (s) ¹

(o) *Wright v. Simpson*, 16 Ves. 734.
JERVIS, C. J., Strong v. Foster, 17 C.
 B. 216.

(p) *Tucker v. Laing*, 2 K. & J.
 749.

(q) *Orme v. Young*, Holt, 84.
Lond. Ass. Comp. v. Buckle, 4 Moore,

153. *Goring v. Edmonds*, 6 Bing. 94.
Dawson v. Lawes, 23 L. J., Ch. 434.

(r) *Twopenny v. Young*, 3 B. & C.
 210. *Bell v. Banks*, 3 Sc. N. R.
 503.

(s) *Laxton v. Peat*, 2 Campb. 186.
Bailey v. Edwards, 4 B. & S. 761; 34
 L. J., Q. B. 41.

¹ It is important to observe that mere forbearance will not operate to discharge the surety, unless there be some agreement upon consideration which would prevent the creditor from suing. *Hunt v. Knox*, 34 Miss. (5 Geo.) 655; *Kirby v. Studebaker*, 15 Ind. 45; *McMullen v. Hinkle*, 39 Miss. 142

1129. *Proof of suretyship where the relation does not appear upon the face of the contract.*—The doctrine of the discharge of the surety by time given to

Oberndorf v. Union Bank of Baltimore, 31 Md. 126; 1 Amer. 31; Rucker v. Robinson, 38 Mo. 154; McCune v. Belt, 36 Id. 181. But a giving of time to the debtor will discharge the surety. Blazer v. Bundy, 15 Ohio St. 57; Brookline v. Shumway, 18 Wis. 98; Albany Ins. Co. v. Devendorf, 43 Barb. 444; Pilgrim v. Dykes, 24 Tex. 383; People's Bank v. Pearsons, 30 Vt. 711; Draper v. Trescott, 29 Barb. (N. Y.) 401, &c.; Clipper v. Creps, 2 Watts (Pa.) 45; Bank v. Woodward, 5 N. H. 99; Bank v. Hoge, 6 Ohio, 17; Kennebec Bank v. Tuckerman, 5 Me. 130; Cunningham v. Wren, 23 Ill. 64; King v. Baldwin, 2 Johns. Ch. (N. Y.) 529; Coke v. Smith, 2 Serg. & R. (Pa.) 113; and see Sailly v. Ellmore, 2 Paige Ch. (N. Y.) 496; Baird v. Rice, 1 Call. (Va.) 18; Ellis v. Bibb, 3 Ala. 63; Hunt v. United States, 1 Gall. C. C. 32; Hunt v. Bridgham, 12 Pick. (Mass.) 581; Naylor v. Moody, 3 Black. (Ind.) 93; Miller v. Stein, 2 Penn. St. 286; Parnell v. Price, 3 Rich. (S. C.) 121; Waters v. Simpson, 7 Ill. 570; United States v. Hodge, How. 279; Horne v. Bodwell, 5 Gray (Mass.) 457; Humphreys v. Crane, 5 Cal. 173; Richards v. Commonwealth, 40 Penn. St. 146; Hunt v. Knox, 34 Miss. 365. But if the agreement to give time be founded upon no consideration, it will not discharge the surety. Zane v. Kennedy, 73 Penn. St. 182; State v. Manning, 55 Mo. 142; Liebrandt v. Myron Lodge, 61 Ill. 81; Barnes v. Crandall, 11 La. Ann. 19; Jarvis v. Hyatt, 43 Ind. 163; Silmeyer v. Schaffer, 60 Ill. 479. And if such an extension as will release him has been given without his knowledge, and the surety, in ignorance thereof, again promise to pay his principal's debt, such subsequent promise will not bind the surety. Montgomery v. Hamilton, 43 Ind. 451. Such a contract for extension of time may be implied by law—as where the debtor has accepted interest in advance, the law will imply an extension of time for the interval covered by such interest. Jarvis v. Hyatt, 43 Ind. 163; Hamilton v. Winterrowd, Id. 401; Morgan v. Coffman, 8 La. Ann. 56; Peacock v. Chapman, Id. 87; Deuill v. Martel, 10 Id. 643; see, however, Hayes v. Wells, 34 Md. 512; Hunt v. Roberts, 45 N. Y. 691; Bowen v. Darbey, 14 Fla. 202; Howard v. Clark, 36 Iowa, 270; Chickasan v. Pitcher, Id. 593. It has been said that mere delay, unaccompanied by a definite extension of time, under contract

the principal debtor, by a binding contract, is not confined to cases where the relation of suretyship appears on the face of the original contract between the cred-

and for consideration, will not amount to such laches on the creditor's part as to discharge the sureties. *Meniffee v. Clark*, 35 Ind. 304; *Hunt v. Postlewait*, 28 Iowa, 427; *Davis v. Graham*, 29 Id. 514; *Galbraith v. Fullerton*, 53 Ill. 126; *Pittsburg, &c., R. R. Co. v. Shaeffer*, 59 Penn. St. 35; *Pierce v. Goldsberry*, 31 Ind. 52; *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602; *Preston v. Henning*, 6 Bush. (Ky.) 556; *Bridges v. Winters*, 42 Miss. 135; *Buckalew v. Smith*, 44 Ala. 638; *Pitman v. Chisholm*, 43 Ga. 442; *Hayes v. Wells*, 34 Md. 512; *Deal v. Cochran*, 66 N. C. 269. So when a creditor received a check, with the understanding that the debtor, who drew the check, had no funds in the bank to meet it—but would have, in two or three days—it was held that this was not such a giving of time as would discharge the surety. *Bordelon v. Weymouth*, 14 La. Ann. 93. And where a transaction would otherwise have this effect of releasing a surety, it will not, either at law or equity, if the remedy against the surety is expressly reserved. See also, as to consideration, *Lowman v. Yates*, 37 N. Y. 601; *S. C.*, 3 Trans. App. 320; *Smith v. Townsend*, 25 N. Y. 479; *Platt v. Stark*, 2 Hilt. (N. Y.) 399. As to usurious, see *Draper v. Trescott*, 29 Barb. 401. Part payment of a debt overdue is not such a consideration for a promise to extend time as will discharge sureties. *Halliday v. Hart*, 30 N. Y. 474. The taking, by the plaintiff, of another bond, at a higher rate of interest, as collateral security to the original, and having a longer time to run, and the receipt of interest on such new bond, does not release the defendant on his guaranty, although it appeared that the principal debtor became insolvent subsequent to the taking of the new bond. *Remsen v. Graves*, 41 N. Y. 474; but in *Barhydt v. Ellis*, 45 N. Y. 107 where it was held, that when, by the laches of the creditor, the surety's means of indemnity are impaired, his liability is discharged only to the extent of the loss sustained by reason of the laches. Mere delay to sue a principal, however long continued, will not discharge the surety. *Williams v. Townsend*, 1 Bosw. (N. Y.) 411; *Hunter v. Clark*, 28 Tex. 159; *People v. Jansey*, 7 Johns. (N. Y.) 332; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Kirby v. Studebaker*, 15 Ind. 45; *Pain v. Packard*, 13 Johns. (N. Y.) 174; *Powell v. Waters*, 17 Id. 176; *Goldsmith v. Brown*, 35 Barb. (N. Y.) 484; *Dorlon v. Christie*, 39 Id. 610;

itor, the principal, and the alleged surety. (t) The equity arises from the relation of the co-obligors, or co-promisors inter se, and on the knowledge by the creditor of the existence of that relation. (u) It is held

(t) *Rayner v. Fussey*, 28 L. J., Ex. M. & G. 696. *The Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R., 7 Ch. 142; 41 L. J., Ch. 332.

(u) *Davies v. Stainbank*, 6 De Gex, Co., L. R., 7 Ch. 142; 41 L. J., Ch. 332. *Thompson v. Hall*, 45 Id. 214; *Hunt v. Knox*, 34 Miss. 655; *Richards v. Commonwealth*, 40 Penn. St. 146. But the neglect of a creditor to sue when requested by the surety, discharges the surety, irrespective of any knowledge on the part of the creditor, or notice to him of any facts suggesting the probability that delay would prove injurious to the surety. *Kaufman v. Wilson*, 29 Ind. 504; *Taylor v. Davis*, 38 Miss. 493; *Remsen v. Beekman*, 25 N. Y. 552; *Ranney v. Purvis*, 38 Miss. 499; *Cain v. Bates*, 35 Mo. 427; *Singer v. Troutman*, 49 Barb. (N. Y.) 182; *Simpson v. Blount*, 42 Mo. 542. A request made by sureties to a creditor, to enforce securities held by the latter from their principal, does not impose upon the creditor the absolute duty of enforcing such securities without delay; but if the creditor, in bad faith, unreasonably neglects or delays, or is grossly negligent, whereby the value of the securities is impaired, the loss occasioned is a defense available to that extent by the sureties. *Black River Bank v. Page*, 44 N. Y. 453; and see *Hayes v. Ward*, 4 Johns Ch. (N. Y.) 123; *Herrick v. Borst*, 4 Hill (N. Y.) 650; and what will constitute a request will depend upon circumstances. A request that a creditor should "push" the debtor, and "keep pushing him," was held, in *Singer v. Troutman*, 49 Barb. (N. Y.) 182, not to amount to a request to prosecute or collect. The loss of another security, in consequence of the mere passiveness of the creditor, as for example, his failure to record a mortgage, will not discharge the surety, the latter not having requested such action. *Phillbrooks v. McEwen*, 29 Ind. 347. But see as per contra, *Toomer v. Dickerson*, 37 Ga. 428; *Hampton v. Levy*, 1 McCord Ch. (S. C.) 107; *Long v. Brevard*, 3 Strobe Eq. 59; and see *Boyd v. Titzer*, 6 Coldw. (Tenn.) 568; *Remsen v. Beekman*, 25 N. Y. 552; *Wintersmith v. Tabor*, 5 Bush. 105. In Kentucky, the release of a surety under section 11 of 2 R. S. c. 97, in case of a failure to issue execution on the bond within one year, &c., has been held not to apply to judicial bonds, the collection of which is controlled by the court. *Rankin v. White*, 3 Bush. (Ky.) 545; *Barbee v. Pitman*, Id. 259.

to be inequitable in the creditor knowingly to prejudice the rights of the surety, although he may know of the existence of the relation of suretyship only at the time of his dealing with the principal debtor so as to prejudice such rights. (x) But extraneous evidence is not admissible for the purpose of showing that a party who, on the face of the contract, has incurred a primary liability, was only intended to be secondarily liable as a surety after the default of another principal contracting party. (y)¹

1130. *Effect of giving time to the principal debtor with reserve of remedies against the surety*.—If, after the principal debtor has made default, and the surety has become liable to the payment of the debt, the creditor, by a binding contract, agrees to give his principal debtor time for payment, and in the same contract expressly stipulates for the reservation of all his remedies against the surety, the latter will still remain liable, notwithstanding the arrangement between the principal and the creditor. (z) “The reserve of rem-

(x) *Pooley v. Harradine*, *Greenough v. McClelland*, *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J., Q. B. 41. *Taylor v. Burgess*, 1 Law T. R. N. S. 12.

(y) *Hollier v. Eyre*, 9 Cl. & Fin. 45.

(z) *Ld. Eldon, Ex parte Glendenning*, *Buck's B. C.* 519.

¹ The manifest intention to become a surety must clearly appear. See *Menard v. Scudder*, 7 La. Ann. 385. The obligation of a guarantor is that which the fair import of the language of the guaranty imposes upon him. *Simons v. Steele*, 36 N. H. 73; *Benjamin v. Hilliard*, 23 How. (U. S.) 149; *Scully v. Hawkins*, 14 La. Ann. 183. But the law will imply no condition which is not incorporated into the contract or fairly implied from its language. *Bigelow v. Benton*, 14 Barb. 123; *Wright v. Johnson*, 8 Wend. 512; *Hunt v. Smith*, 17 Id. 17, 179; *Dobbin v. Brandley*, Id. 422; *Walrath v. Thompson*, 6 Hill, 540; 2 Comst. (N. Y.) 185. Ordinarily, however, it is said that the contract of guaranty is one to be construed strictly against the guarantor. *Bailey v. Larchar*, 5 R. I. 530.

edies," observes PARKE, B, "has that effect upon this principle; first, it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and secondly, it prevents the rights of the surety against the principal debtor being impaired, the injury to such rights being the other reason; for the principal debtor can not complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him." (a) And, if a security is taken which, by extending the time of payment, would operate to release the surety, the creditor may prove by parol evidence that an agreement was come to between the creditor and the principal debtor that the transaction should not have that effect, and may thus keep alive the liability of the surety. (b)

In the French law, and also in the civil law, an enlargement of the time given to the principal creditor for payment does not discharge the surety. "When," observes Pothier, "the creditor, after the contract has been entered into, accords, through liberality a certain term of payment to his debtor, he can not lawfully exclude the sureties from a participation in the benefit of such term; for, as the agreement has the effect of qualifying the liability upon the principal obligation, and extending the term of payment, the obligation of the sureties necessarily receives the same modification, and they have the same term of payment as the principal debtor, it being the essence of the con

(a) *Kearsley v. Cole*, 16 M. & W. 135. *Price v. Barker*, 4 Ell. & Bl. 779; 24 L. J., Q. B. 134.

(b) *Wyke v. Rogers*, 21 L. J., Ch. 613. *Boaler v. Mayor*, 19 C. B., N. S., 76; 34 L. J., C. P. 230.

tract of suretyship that the surety should not be obliged to more than the principal." (c)

1131. *Release of the principal debt—Discharge of the surety.*—If a debt secured by the collateral undertaking of a surety be unconditionally released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety. *Reo liberato liberantur fidejussores.* (d) If, therefore, a creditor, by deed of composition, releases his debtor and precludes himself from suing upon the original obligation for the original debt, the surety is discharged, unless the rights of the creditor against the surety have been expressly reserved on the face of the deed, (e) or unless by the terms of the guarantee the surety is not discharged by the release of the principal debtor. (f) "The surety," observes Pothier, "is discharged by novation of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt is not the debt for which he became bound." (g)

1132. *Release of the principal obligation, with reserve of remedies against the surety.*—But, if the principal debtor has made default, so that the liability of the surety has accrued, and the creditor has an immediate right of action against him, the creditor

(c) Pothier (OBLIGATIONS), No. 204; 38 L. J. Ch. 76, 220. Dig. lib. 381. 14, tit. 3.

(d) Webb v. Hewitt 3 Kay & J. 444. Vorley v. Barrett, 26 L. J., C. P. 1. (f) Union Bank of Manchester v. Beech, 3 H. & C. 672; 34 L. J., Ex. 133.

(e.) Lewis v. Jones, 4 B. & C. 513, (g) Poth. (OBL.) No. 378. Cod 515. Green v. Wynn, L. R., 4 Ch. lib. 8, tit. 41, lex. 4.

may compound with the principal debtor, receiving a portion only of the debt, and may release him from the payment of the residue, and at the same time reserve all his rights and remedies against the surety (*h*) A deed of release of this sort, with reserve of remedies against the surety, is construed as a covenant not to sue, in order that effect may be given to the intention of the parties, and the right of recourse against the surety be preserved. (*i*) Where, therefore upon the grant of an annuity, two co-sureties entered into a joint and several covenant for the payment by them of the annuity, in case of default made by the grantor, and default was made by him, and the co-sureties became liable upon their covenant, and a deed was then entered into between the grantor and grantee of the annuity and one of the co-sureties, whereby, in consideration of all arrears of the annuity being paid up by such co-surety, the latter was released from the future payment of the annuity, and from all further liability upon his covenant, but it was provided that nothing therein contained should prejudice the rights of the grantee of the annuity as against the grantor and the other co-surety, it was held that this proviso prevented the release from operating as a discharge of the co-surety, as it did not in anywise prejudice the latter or increase his liability. (*k*) But a release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy" is an absolute release, and, if given without the surety's consent, dis-

(*h*) *Ex parte* Glendenning, Buck, B. C. 520; *Ib.* 560. Boulton v. Stubbbs, 12 Ves. 22.

(*i*) *Hudson's Case*, L. R., 12 Eq. 1. *Nevill's Case*, L. R., 6 Ch. 43. *Green v. Wynn*, L. R., 4 Ch. 204; 38 L. J.,

Ch. 76, 220. *Roberts v. Crowe*, L. R., 7 C. P. 629. *Bateson v. Gosling* L. R., 7 C. P. 9; 41 L. J., C. P. 53.

(*k*) *Thompson v. Lack*, 3 C. B. 552 *Kearsley v. Cole*, 16 M. & W. 135.

charges him. (*l*) It seems to be the result of the authorities that a release qualified by a reserve of the remedies against sureties allows the surety to retain all his rights over against the principal debtor, and operates only so far as the rights of the surety may not be affected; (*m*) but it remains to be considered in every case, whether the arrangement between the principal debtor and the creditor does prejudicially affect the rights or remedies of the surety; (*n*) for, if it does, the surety is entitled to say that he is discharged. (*o*)¹

(*l*) Cragoe v. Jones, L. R., 8 Ex. 81; 42 L. J., Ex. 68.

(*m*) Price v. Barker, *ante*.

(*n*) Owen v. Homan, 20 L. J., Ch. 323; 4 H. L. C. 1037.

(*o*) Wright v. Sandars, 3 Jur., N. S. 507.

¹ Release of the principal obligation will discharge the surety if it be by the use of securities. Succession of Pratt, 16 La. Ann. 357; Kennedy v. Bossiere, Id. 445; Richards v. Commonwealth, 40 Pa. St. 146; or by funds applied. If the debtor at the time of payment fail to make the application, and the right to do so becomes the creditors, it is generally held that he may apply the payments upon the unsecured debt. Putnam v. Russell, 17 Vt. 54. But it has been held, the creditor must make a reasonable application, and one to which the debtor could not reasonably object. Ayer v. Hawkins, 19 Vt. 26, see also Hargraves v. Cooke, 15 Geo. 321; Livermore v. Rand, 6 Foster, 85; Callahan v. Boazman, 21 Ala. 246, &c., &c. It has been said that the payment should be applied in the manner most beneficial to the debtor; Hamer v. Kirkwood, 25 Miss. 95; Livermore v. Rand, 6 Foster, N. H. 85; and again, as a general rule, it should be applied to the oldest debt; Millikin v. Tufts, 31 Me. 497; Dows v. Morewood, 10 Barb (N. Y.) 183; Hunter v. Osterhoudt, 11 Barb. 33; Caldwell v. Wintworth, 14 N. H. 431, &c., &c., &c. But if any understanding can be ascertained as existing between the parties, at the time of the payment, courts will follow that. Emery v. Tichout, 13 Vt. 15; Stewart v. Keith, 12 Pa. St. 238. A partial payment by the debtor will not, in any event, relieve the surety. Ellis v. McCormick, 1 Hilton (N. Y.) 313; Hunt v. Knox, 34 Miss. 555; Oberndorf v. Union Bank of Baltimore, 31 Md. 126; 1 Amer. 31; although a lawful tender of the

1133. *Release of one of several co-sureties.*—A release by the creditor of one of two or more co-sureties releases all. (*p*) From some of the expres

(*p*) *Cheetham v. Ward*, 1 B. & P. 633.

amount of his debt, by the principal, to the creditor may: *Mitchell v. Merrill*, 2 Black. (Ind.) 87; *Brown v. Dysinger*, 1 Rawle (Penn.) 407; *Wallace v. McConneil*, 13 Pet. (U. S.) 163; *Joslyn v. Eastman*, 46 Vt. 258. An acceptance by a creditor of a confession of judgment; *Bank of Steubenville v. Leavitt*, 5 Hamm. 207; *Norris v. Crummey*, 2 Rand, 323; or a submission of the claim to an arbitration, *Eldred v. Bennett*, 33 Pa. St. 183; will discharge the surety. It is said that a surety might be discharged by the mistake or omission of another, as in a case where the return upon a writ of replevin fails to state precisely what property is thereby replevied, the sureties on the bond are not liable to return such property as has not been taken. *Miller v. Moses*, 56 Mass. 128. A. levied on property belonging to B., on execution against B. and C., who were respectively principal and surety; and D. claimed this property and replevied it. Upon trial of the replevin suit, judgment was rendered against D.; the property was returned to B., and an action was commenced on the replevin bond. A. then brought suit on the original judgment against B. and C., and, upon recovering judgment, the same was satisfied by the surety C. Held, that the payment of the original debt to A. discharged D. from all liability on the replevin bond. *Moore v. Campbell*, 36 Vt. 361. This seems to be similar to the doctrine of the civil law, that a surety is discharged from his obligation entered into under an error, either of fact or of law, and which he does not ratify by continuing the contract after the discovery. *Burge on Suretyship*, 231. The surety may be discharged, either in whole or in part, by process of a court, as in the case of an injunction being served upon him, as in *Cerning v. Elliot*, 10 La. Ann. 753. A surety with others may be discharged by verdict and judgment in an action against his co-surety. *Hill v. Morse*, 61 Me. 541. Though where judgment was recovered against the principal and surety in a note, and subsequently action was brought thereon, and a new judgment obtained against the principal—held, that the surety was not discharged, even though the lien of the first judgment was lost by the rendition of the second. *Perry v. Saunders*, 36 Iowa, 427. In *Harriman v. Egbert*, Id. 270, it was held that notice from a surety to the creditor to bring suit upon the

sions of Lord ELDON, (*q*) it would seem that a creditor might release one of his joint debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them ; but Lord ELDON's authority upon this point has been expressly overruled. (*r*)

1134. *Payment by the principal debtor operating as a discharge of the surety.*—If a party becomes surety for the due payment of all money that comes to the hand of the principal, the surety is discharged, if the principal pays in such currency as the parties to whom the payment is to be made are willing to accept. If, therefore, they have the option of receiving cash, and choose, nevertheless, to take bills or notes from the principal which are ultimately dishonored, the surety is nevertheless discharged.¹ Thus, where a country banker was appointed treasurer of a poor-law union, and the defendant became surety to the guardians for the due performance by him of the duties of his office, and the treasurer made a payment to the guardians,

(*q*) *Ex parte* Gifford, 6 Ves. 808.

683. *Evans v. Bremridge*, 25 L. J.,

(*r*) *Nicholson v. Bevill*, 4 Ad. & E. Ch. 104.

obligation, should demand that a suit be brought against all the parties, and not simply against the principal, otherwise failure of the creditor to bring suit will not discharge the surety ; or, by a stay of execution against the creditor, given by a co-surety, to whom a judgment has been, in whole or in part, assigned ; *Smith v. Shidler*, 3 Pitts. 550.

¹ But this is doubtful. When the obligation of the sureties is joint and several, the discharge of one of them does not release the others from payment of their proper proportion of the claim. *Klingensmith v. Klingensmith*, 31 Penn. St. 460 ; *Barrow v. Shields*, 13 La. Ann. 57 ; *Alford v. Baxter*, 36 Vt. 158 ; and see *Remington v. Staats*, 1 N. Y. S. C. R. (Thompson & Cook) 294 ; *Garey v. Hignutt*, 32 Md. 552. As to the substitution of a surety, see *Adams v. Ives*, 1 Hun (8 N. Y. S. C.),

partly in cash, and partly in the notes of his own bank, payable on demand, and the guardians kept the notes for a day or two, and the bank then stopped payment, it was held that the guardians, having elected to receive and keep the notes, could not, after the stoppage of the bank, repudiate the payment as against the surety. (*s*) A payment accepted by the creditor in good faith and without notice, but which is afterwards avoided as a fraudulent preference, does not operate as a satisfaction of the debt, or discharge the surety. (*t*)

If the principal debtor becomes bankrupt, the surety who has paid the debt has a right to stand in the place of the original creditor against the estate of the principal debtor; and if the creditor has received a dividend out of that estate, the surety has a right to be paid that dividend, or to have it deducted from the amount for which he is liable, (*u*) and to have all future dividends secured to him, (*x*) unless he has agreed with the creditor that all dividends received shall be applied as payments in gross, and that the guarantee shall apply to and secure any ultimate balance remaining due. (*y*) If the primary security proves worthless, whether it was so originally, or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor. (*z*) If the principal debtor has a set-off against the creditor arising out of the same

(*s*) *Guard. Lich. Un. v. Greene*, 1 H. & N. 889.

(*t*) *Petty v. Cooke*, L. R. 6, Q. B. 790.

(*u*) *Gee v. Pack*, 33 L. J., Q. B. 49.
Hobson v. Bass, L. R., 6 Ch. 792.

(*x*) *Thornton v. M'Kewan*, 1 Hem. & M. 525; 32 L. J., Ch. 69.

(*y*) *The Midland Banking Co. v. Chambers*, L. R., 7 Eq. 179; *Ib.*, 4 Ch. 398.

(*z*) *Hardwick v. Wright*, 35 Beav 133.

transaction, the surety may take advantage of it in an action against him by the creditor for the amount guaranteed. (*a*)

1135. *Fraud on sureties.*—A creditor is not bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, unless the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence. (*b*) If a person abstains from inquiry because he sees that the result of inquiry will be to disclose fraud, his want of knowledge of the fraud affords no excuse. In some cases willful ignorance is not to be distinguished in its equitable consequences from knowledge. (*c*) If, when a person agrees to become surety, any material part of the contract between the debtor and creditor is misrepresented or concealed from the surety with the knowledge of the creditor, the misrepresentation or concealment amounts to a fraud upon the surety, and discharges him from his engagement; (*d*) but the principal is not bound to disclose to the surety every material circumstance known to him that may be calculated to affect or increase the responsibility of the surety. (*e*) Where a widow in straightened circumstances took a house upon the terms that she was to take the furniture of the preceding tenant at a valuation, provided she could raise the money, and a surety came forward upon the understanding that the price

(*a*) *Bechervaise v. Lewis*, 1 L. R., 7 C. P. 372; 41 L. J., C. P. 161.

(*b*) *Hamilton v. Watson*, 12 Cl. & Fin. 119. *Wythes v. Labouchere*, 5 Jur., N. S., 499.

(*c*) *Owen v. Homan*, 4 H. L. C. 1035.

(*d*) *Stone v. Compton*, 6 Sc. 846;

5 Bing., N. S., 142. *Railton v. Mathews*, 10 Cl. & Fin. 942. *Spaight v. Cowne*, 1 H. & M. 359. *Lee v. Jones*, 17 C. B., N. S., 482; 34 L. J. C. P. 131. *Blest v. Brown*, 3 Giff. 450.

(*e*) *North Brit. Ass. Co. v. Lloyd*, 10 Exch. 523; 24 L. J., Ex. 14.

to be paid by her for the furniture had been settled at £70, and became responsible for the payment of that amount, but it afterwards appeared that there had been a secret understanding between the widow and the parties, that the real price was to be £100, and that the widow had given two promissory notes to secure the payment of the additional £30, the existence of which, as well as of the underhand agreement, had been kept back from the surety, it was held that the transaction was a gross fraud upon the latter. (*f*) So, where a surety had given a guarantee to the creditor to secure payment of iron of the value of £200, to be supplied to the principal debtor, and it appeared that there had been a private agreement between the creditor and the principal debtor, that the latter should pay 10s per ton beyond the market price, to be applied to the liquidation of an old-standing debt due to the former, it was held that the agreement was a fraud upon the surety, which discharged him from liability upon his contract. (*g*) Where a surety was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, it was held that he was entitled to have the bond canceled. (*h*)

If a man finds that his agent has betrayed his trust, that he owes him a sum of money, or that it is likely he is in his debt, and, under such circumstances, requires sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he is not so, he can not afterwards avail

(*f*) *Jackson v. Duchaire*, 3 T. R. 552.

(*g*) *Pidcock v. Bishop*, 5 D. & R.

509, 511; 3 B. & C. 605.

(*h*) *Blest v. Brown*, 3 Giff. 450.
Cooper v. Joel, 1 De G. F. & J.

240.

himself of a guarantee obtained from a party who was ignorant of what was known to, and ought to have been disclosed by, the employer. So, if a person whose honesty is guaranteed, makes defalcations, which the employer condones without notice to the guarantor, the latter is not liable for subsequent defalcations. (*i*) But, if a person having doubts as to the circumstances of his agent, and therefore requiring fresh sureties, states his doubts at the time to these sureties, they have no right to complain when they are called upon to fulfill their engagement. (*k*)

1136. *Discharge of the surety by the death of the principal.*—Where the liability of the surety does not arise until after default has been made by the principal, and the latter dies before making default, the surety is discharged. Thus, where A. becomes bound for the appearance or surrender of B. by a particular day, and B. dies before the day, A. is discharged from his obligation. (*l*)

1137. *Death of surety.*—A. having guaranteed thus: "To C. I request you will credit B.; and, in consideration thereof, I guarantee the running balance;" it was held that the promise was not revoked by A.'s death without notice to C. from the executor. (*m*)¹

1138. *Indemnification of sureties.*—When the engagement of the surety is made with the knowledge and consent of the principal, there is in point of law an implied request from the latter to the surety to in-

(*i*) Phillips v. Foxall, L. R., 7 Q. B. 29.
666; 41 L. J., Q. B. 293.

(*k*) Smith v. Gov. & Co. Bank of
Scot., 1 Dow. 292.

(*l*) Sparrow v. Sowgate, W. Jones, 869.

(*m*) Bradbury v. Morgan, 31 L. J.,
And see Harriss v. Fawcett.
L. R., 15 Eq. 311; Ib., 8 Ch. 866

¹ See Pickersgill v. Lahens, 15 Wall. 141.

serve on his, the principal's, behalf, if the latter makes default ; and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal at his request, which may be recovered from the latter. (*n*) The surety need not wait for the commencement of an action against the principal ; (*o*) but he can not accelerate the liability of the latter ; and, if he pays money voluntarily which he was not under any legal obligation to pay, he has no ground of action against the principal until the time of payment is past. A surety who has paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree. (*p*)

By the French law, whether the surety has paid in consequence of a judgment of a court of law, or voluntarily and without legal process, is a matter of no moment ; for, in either case, *utiliter debitoris negotium gerit*. He has procured his discharge from the debt, and ought, consequently, to be reimbursed what it cost him to do so. But, if he has paid before the time of payment has elapsed, he can not have recourse against the principal debtor until afterwards ; for he ought not by his own act to deprive the latter of the term of indulgence which he has a right to enjoy. (*q*) The surety may, however, by express contract, obtain a right to sue the latter before he has himself paid or satisfied the principal obligation. If the principal, for

(*n*) Kearsley v. Cole, 16 M. & W. 128. Boyd v. Brooks, 34 L. J., Ch. 605. *Si quid autem fidejussor pro reo solverit, ejus recuperandi causâ habet cum eo mandati judicium*. Instit. lib. 3, tit. 21, § 6.

(*o*) Small v. Currie, 5 De G. M. & G. 159.

(*p*) Boyd v. Brooks, 34 L. J., Ch. 605.

(*q*) Poth. (OBL.) No. 431, 439. Dig. lib. 17, tit. 1, lex 22.

example, covenants with the surety that he will pay the creditor the debt by a day named, and makes default, the surety may sue him for the amount, although he has not himself, at the time he brings the action, paid any portion of the debt. (r) By the law of France, and by the civil law, the surety is under no necessity for securing to himself this right by express contract ; for, whenever the principal debtor falls into embarrassed circumstances, and is threatened with insolvency, that law accords to the surety a right to attach the goods and chattels of the principal debtor, and so provide himself with funds beforehand to answer the engagement he has entered into on his behalf. (s)

If the surety has bound himself for the payment of a debt due from several joint debtors, and has been compelled to pay money on their joint account, they are jointly responsible to him for the repayment of the amount. (t)

1139. *Contribution between co-sureties.*—It has previously been stated that, if several persons together become surety for one principal in respect of the same debt and transaction, either jointly or severally, or by the same or different contracts, (u) and one of such co-sureties, after the liability of the principal has arisen, pays the debt, or satisfies the whole debt or claim, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them their several proportions of the common liability in an action for money paid by him for their

(r) *Loosemore v. Radford*, 9 M. & W. 657.

(s) Poth. (OBL.) No. 442. Cod. lib. 4, tit. 35, lex 10.

(t) Poth (OBL.) No. 440.

(u) And although they do not know of each other's liability. *Dering v. Earl of Winchelsea*, 1 Cox, 318. *Whiting v. Burke*, L. R., 10 Eq. 539 ; *Ib.*, 6 Ch. 342.

use, (*x*) unless the plaintiff seeking contribution has promised to save the defendant harmless, (*y*) or the defendant has become surety at the request of the plaintiff, and for his accommodation. (*z*) In equity, where one of three sureties had paid a sum of money, it was held that he was entitled to recover one moiety from another of the co-sureties, the third having become insolvent; (*a*) but at law one of three co-sureties could only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of the sureties. (*b*)

If one of two co-sureties pays part of the debt only, and less than his moiety, he is not entitled to resort to his co-surety for contribution; for the latter might subsequently have to pay an equal or greater portion of the debt; in the former of which cases such co-surety would have no contribution to pay, and in the latter he would have one to receive; and it would tend to multiplicity of suits and great inconvenience if each co-surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the co-sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and that an action will lie for it. (*c*) Where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date

(*x*) *Kemp v. Finden*, 12 M. & W. 421.

(*y*) *Thomas v. Cooke*, 8 B. & C. 728.

(*z*) *Turner v. Davies*, 2 Esp. 478.

(*a*) *Peter v. Rich*, 1 Ch. C. 34. *Hitchman v. Stewart*, 3 Drew, 271.

(*b*) *Browne v. Lee*, 6 B. & C. 697. *Kemp v. Finden*, 12 M. & W. 421.

(*c*) *PARKE, B., Davies v. Humphreys* 6 M. & W. 169.

as sureties for such principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, and the plaintiff then paid the residue, although no demand had been made upon him by the creditor for payment, and subsequently brought his action against the defendant, his co-surety, for contribution, it was held that he was entitled to recover a moiety of the amount he had paid. (*d*) All persons who by common consent put their names to an accommodation bill, whether as drawers, acceptors, or indorsers, in order that one of them may get the bill discounted for his own benefit, are co-sureties for the due payment of the bill; and, if the bill is dishonored at maturity, and one of them is compelled to pay the amount of the bill, and thus releases all the other parties from their common liability upon the instrument, the one so paying is entitled to contribution from the others. (*e*)

The principle of contribution amongst sureties has been established by the French jurists, observes Pothier, upon a principle of equity, which does not permit the co-sureties, who were all equally liable to the payment, and have all been equally benefitted by the discharge of the principal obligation, to profit at the expense of him by whom the payment has been made, and who has acted for the benefit of his co-sureties at the same time that he was acting for himself. (*f*) The civil law does not admit the principle of contribution between co-sureties, but enables each of

(*d*) Pitt v. Purssord, 8 M. & W. 539.

(*e*) Reynolds v. Wheeler, 10 C. B., N. S., 561; 30 L. J., C. P. 350.

(*f*) Ayant quant à l'effet géré l'affaire de ses confidés, en même temps qu'il faisait la sienne,

les ayant par la paiement qu'il a fait libérés d'une dette qui leur était commune avec lui, l'équité exige qu'ils portent leur part de ce paiement, dont ils ont profité autant que lui. Poth. (OIL.), No. 445. Argentré, 213, art. 194.

them, before action brought, to protect himself from being sued for more than his own share. (*g*)¹

II40. *Assignments of judgments and securities*

(*g*) Dig. lib. 46, tit. 1, lex 39. Instit. lib. 3, tit. 21, § 4.

¹ The relation of co-suretyship is not always clear. Parol evidence will not be admissible to prove that persons are co-sureties, although it may be introduced as between themselves to show the nature of their transactions. *Davis v. Staats*, 43 Ind. 103; *Harshman v. Armstrong*, Id. 126. The obligation of co-sureties, though several, is not collateral. It is for the same thing. They have a right of indemnity against their principal, and there is generally such mutuality between them as to render the right and duty of contribution reciprocal. *Monson v. Drakeley*, 40 Conn. 553. As to a privity between co-sureties, see *Simpson v. Bovard*, 74 Penn. St. 351, which held that a surety is liable even if the co-surety whom he expected would sign with him, did not. But the relation once established, and the co-sureties being each surety for the same thing, the right of mutual contribution exists. But equity will sometimes look at substance more than form, and if several persons enter into contracts of suretyship which are the same in their legal character and operation, though by different instruments, at different times, and without the knowledge of each other, they will be bound to mutual contribution. *Monson v. Drakeley*, 40 Conn. 553; and see *Boyd v. McDonough*, 39 How. 389; *Stallworth v. Preslar*, 34 Ala. 505; *McCune v. Belt*, 45 Mo. 174; *Bond v. Bishop*, 18 La. Ann. 549. The right of contribution is dependent, not upon contract, but upon principles of justice and equity. *Matthews v. Aiken*, 1 Comst. 595; *Smith v. Anderson*, 18 Mo. 520; *Springer v. Springer*, 43 Penn. St. 518. But whatever will relieve the surety in equity will also relieve him in law. *Boyd v. McDonough*, 39 How. (N. Y.) Pr. 389; *Horner v. Lyman*, 2 Abb. (N. Y.) App. Dec. 399. A surety's right to contribution is assignable, and equity will substitute his assignee to all the rights of an original surety or creditor. *York v. Landis*, 65 N. C. 535. In Kentucky this right of a surety to sue for contribution is limited to five years from the payment. *Robinson v. Jennings*, 2 Bush. (Ky.) 630. Where ten sureties bound themselves severally, and not jointly, in the sum of \$2,000 each on the bond of an officer, who afterwards defaulted, it was held, that each

to the surety to enable him to obtain indemnification.—Every person who, being surety for the debt or duty of another, or being liable with another for any debt

surety was liable for the full amount of \$2,000 so long as the unsatisfied defalcation of the principal exceeded that amount, although the defalcation did not amount to \$20,000. *Bank of Brighton v. Smith*, 12 Allen, 243. A surety who has paid all or part of the judgment debt of his principal—the principal paying the balance—will be subrogated to all the benefits and privileges of the judgment creditor; but otherwise if any balance of such judgment debt remains unpaid. *Re Hess' Estate*, 69 Penn. St. 272; *Field v. Hamilton*, 45 Vt. 35; *Magee v. Leggett*, 48 Miss. 139. Where parties were sureties on an official bond, upon which judgment had been recovered and paid by plaintiff, in an action for contribution, defendants alleged that they had never been served with process, nor appeared in the action on the bond; that the plaintiff had appeared for them without authority, and had suffered judgment to be entered to defraud them; that he had, without their knowledge, entered into a special contract with the relators in that action, to pay the judgment out of funds then in his hands, belonging to the principal on the bond, and, in consideration of such an agreement, received an extension of one year's time on said judgment, &c.; held, that these facts did not constitute a defense to the action. *Bagott v. Mullen*, 32 Ind. 332; 2 Amer. 351. But where one of the sureties has made, or is about to make, a disposition of his property, so as to throw the burden of the debt on the co-sureties, if the principal debtor is insolvent, a court of chancery will restrain or relieve against such a disposition. *Bowen v. Hoskins*, 45 Mass. 183. If a co-surety has collaterals placed in his hands, and relinquish them without fraud, though without the consent of his co-sureties, the liability of the co-sureties to contribution will not be discharged. *Paulin v. Kaighn*, 3 Dutch, 503. A co-surety may bring into court his share of the debt, on the trial of an action for contribution, and be relieved from further responsibility and costs. *Smith v. Anderson*, 18 Md. 520; *Le Doux v. Durrive*, 10 La. Ann. 7. So a surety, compelled to pay the debt, may recover the amount from another surety in whose hands the principal has placed property sufficient to satisfy the debt, without having previously demanded it. *Parham v. Green*, 64 N. C. 436; *Creed v. Scruggs*, 1 Heisk. (Tenn.) 590; *Berthold v. Berthold*, 46 Mo. 557; *York v. Landis*, 65 N. C. 535. But no

or duty, shall pay such debt or perform such duty, is entitled (19 & 20 Vict. c. 97, s. 5) to have assigned to him, or to a trustee for him, every judgment, specialty,

right accrues before he has paid the debt, or more than his proportion thereof. *Glass v. Pullen*, 6 Bush. (Ky.) 346; *Camp v. Bostwick*, 20 Ohio St. 337; *Freeman v. Cherry*, 46 Ga. 14; *Currier v. Baker*, 51 N. H. 613; *Barlow v. Disbert*, 39 Ind. 16. And he can not lose the right, once accrued, by the fact that he paid in ignorance of the right, and without stipulating for it. *Dempsey v. Bush*, 18 Ohio St. 376. But if the debt paid by him consisted of a judgment which he was legally or equitably bound to pay, he can not levy contribution. *McCrary v. Parks*, 18 Ohio St. 1. Nor if he have a security for the debt; in that case he must hold the securities for the benefit of all his co-sureties. *McCune v. Belt*, 45 Mo. 174. He is their trustee. *Harrison v. Phillips*, 46 Mo. 520. But when a judgment has been rendered against sureties, a surety can not have contribution against co-surety not included in such judgment. *Hickerson v. Price*, 7 Coldw. (Tenn.) 151. A. signed a contract as surety upon agreement that it was not to be operative as to him unless B. should also sign as surety; held, that where the condition was not complied with, and the covenantee received the guaranty without notice and in good faith, that the surety so signing was bound. *Millett v. Parker*, 2 Met. 608. (Exactly the reverse of this proposition was held in *People v. Bostwick*, 43 Barb. 9; and see *Simpson v. Bovard*, 74 Penn. St. 351.) Where A. executed a bond as surety for \$2,000, and B. as surety for \$18,000, each for the principal and for the same debt,—held, that they were liable in the ratio of one ninth and of eight ninths. *Armitage v. Pulver*, 37 N. Y. 474. Where one of the co-sureties on a bail-bond is the wife of the principal, and the other surety knew that she was his wife when he entered into the bond, the wife will not be liable, but the co-surety will. *Yale v. Wheelock*, 109 Mass. 502. Where the estate of a principal is not sufficient to pay a judgment, the sureties upon it are severally liable, and the successful party has a right to enforce it against any one of them. *Davis v. Hooker*, 33 Miss. 173. A discharge of one surety does not relieve him from contribution to a co-surety for money paid after bankruptcy. *Goss v. Gibson*, 8 Humph. 197; *Dale v. Warren*, 32 Me. 94; *Frentress v. Markle*, 2 Iowa (Greene), 553; *Dunn v. Sparks*, 1 Ind. (Carter) 397. Subrogation ordinarily will not be decreed in favor of a sub-

or other security, held by the creditor in respect of the debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty ; and such person is enti-

sequent lien-holder, nor a surety to the prejudice of intervening rights. *Lloyd v. Galbraith*, 32 Penn. St. 103. In order that one paying the debt of another may be subrogated to the rights of the original creditor, the payment must be at the debtor's instance, or the person paying it must be liable as surety or guarantor. *Wilson v. Brown*, 2 Beasley, 277 ; *Constant v. Matteson*, 22 Ill. 546 ; *Richmond v. Marston*, 15 Ind. 134. Co-sureties have the right to terminate their claim for contribution. Where three sureties agreed that their liability should be divided, and that each should secure to the creditor the payment of his third, and take a discharge to the others--and this was done by one of the sureties, who thereupon obtained from the others a covenant not to sue--it was held, that one of the remaining sureties, who paid afterwards more than his share, could not call upon the retired co-surety for a contribution. *Waggener v. Dyer*, 11 Leigh, 384 ; *Bouchaud v. Dias*, 3 Denio, 238. Co-sureties may by arrangement between them provide that one of them shall assume the whole obligation for the purpose of proving the whole claim at the principal's bankruptcy, even though he has paid nothing upon the joint obligation, and although the same is not yet due. *Crafts v. Mott*, 4 Comst. (N. Y.) 604. A surety, before he has paid the debt of his principal, or more than his aliquot portion thereof, is entitled to an injunction restricting a co-surety from a fraudulent disposition of his property, the principal being insolvent. *Bowen v. Haskins*, 45 Miss. 183 ; 7 Amer. 728. And a release or discharge of the surety does not discharge him from the liability to contribute to his co-surety for money paid after the insolvency or bankruptcy. *Boardman v. Paige*, 11 N. H. 432, 435 ; *Goss v. Gibson*, 8 Humph. 197 ; *Dolé v. Warren*, 32 Me. 94 ; *Fientress v. Markle*, 2 Greene, 553 ; *Dunn v. Sparks*, 1 Carter, 397. But if a judgment is obtained against both principal and surety in bankruptcy, the discharge will be no bar to the surety's action to recover the amount paid by him on the judgment. *Leighton v. Atkins*, 35 Me. 118 ; and see other rights of co-sureties in *Rutledge v. State*, 36 Tex 459 ; *Dodge v. Dunham*, 41 Ind. 180

tled to stand in the place of the creditor and use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, indemnification for the advances made, and loss sustained, by the person who has paid the debt or performed the duty ; and the payment or performance by the surety is not pleadable in bar of any such action or other proceeding by him ; but no co-surety co-contractor, or co-debtor is entitled to recover from any other co-surety, co-contractor, or co-debtor more than the just proportion to which, as between these parties themselves, the latter is justly liable. (*h*) This section applies to a contract entered into before the passing of the Act, provided a breach of it has taken place and payment has been made by the surety after the passing of the Act. (*i*)

The creditor is bound to give to the surety the benefit of every security which he holds at the time of the contract, and is not in equity allowed in any way to vary the position of the surety with reference to those securities ; (*k*) and every security which the creditor has the benefit of at the time the contract of suretyship is entered into is supposed to be made known to the surety at the time he is entering into the obligation ; and if, through any neglect on the part of the creditor, he is deprived of the benefit of them, or is put into a different position from that which he was in at the time the contract was entered into, he is discharged. (*l*) But the surety is not entitled to have an

(*h*) *Batchellor v. Lawrence*, 9 C. B., N. S., 543 ; 30 L. J., C. P. 42. *Drew v. Lockett*, 32 Beav. 499. *Strange v. Fooks*, 4 Giff. 408.

(*i*) *De Wolf v. Lindsell*, L. R., 5

Ex. 209. *Lockhart v. Reilly*, 1 D. & G. 464 ; 27 L. J., Ch. 54.

(*k*) *Pearl v. Deacon*, 24 Beav. 186 26 L. J., Ch. 761.

(*l*) *Newton v. Charlton*, 10 Hare

assignment of the principal security unless he pays the debt in full. (*m*)

1141. *Breach of contracts of indemnity—Bankruptcy of principal debtor.*—Where a surety guaranteed the payment of any debt which the principal debtor might contract from time to time with the plaintiffs, as a running balance of account, to any amount not exceeding £400, and the plaintiffs, on the faith of this guarantee, allowed the principal to get into their debt to the extent of £825, and the principal then became insolvent, and assigned his effects to trustees for the benefit of his creditors, and the plaintiffs proved their debt of £825 against his estate, and received from the trustees a dividend thereon of 8s. 9d. in the pound, and then brought an action against the surety on the guarantee, it was held that the dividend was to be deducted rateably from the whole debt, as well the part covered by the guarantee as the part which was left uncovered; and that the plaintiffs were trustees for the surety of the dividend of that portion of the debt which was covered by the guarantee, and could only recover from the surety the balance remaining of the £400 after deducting the dividend. (*n*) So, where two persons separately guaranteed the payment of all goods supplied to A. B., so that their liability should not exceed £250 each, and goods were supplied to A. B. to the amount of £657, and he then became bankrupt, and the creditor proved for the whole amount, and, having obtained £250 from each of the guarantors, afterwards received 2s.

650. *Strange v. Fooks*, 4 Giff. 412.
Whiting v. Burke, L. R., 10 Eq. 539;
 1b., 6 Ch. 342. *Wulff v. Jay*, L. R., 7
 Q. B. 756; 41 L. J., Q. B. 322.

(*m*) *Ewart Latta*, 4 Macq., H. L. C
 983.

(*n*) *Bardwell v. Lydall*, 5 M. & P.
 335. *Gee v. Pack*, 33 L. J., Q. B
 49.

rd. in the pound on the £657, it was held that each of the guarantors was entitled to a part of this dividend bearing to the whole the same proportion as £250 to £657. (o)

1142. *Recovery of interest on money paid by sureties.*—In cases of contracts of indemnity or suretyship, where a surety has been compelled to pay money which the principal debtor ought to have paid, and has, consequently, been damnified by the loss of the use of his money, he is entitled, in an action on the implied contract of indemnity against the principal, to recover interest on the money he has been compelled to pay; (p) for in every contract of indemnity the party damnified is entitled to recover all such damages, costs, and charges as reasonably and naturally result from the fulfillment by him of the obligation he has contracted on behalf of the principal debtor. (q)

1143. *Guarantees by one of several partners in the name of the co-partnership.*—Where one of the several partners gave a guarantee in the trading name of the firm to secure the payment of a debt of a third party, it was held by Lord ELLENBOROUGH that there was no implied authority resulting from the mere existence of the co-partnership to any one or more of the partners to pledge the partnership name for such a purpose (r) And, where one of two attorneys in partnership together, in order to obtain the discharge of a client from custody, signed the partnership name to an undertaking to pay the debt and costs, it was held that the other partner, who had given no express authority to his colleague to give such an undertaking,

(o) *Hobson v. Boss*, L. R., 6 Ch. Q. B. 242.
 792. *Midland Bank Co. v. Chambers*, (q) *Smith v. Howell*, 6 Exch. 737.
 L. R., 4 Ch. 398. (r) *Duncan v. Lowndes*, 3 Campb.
 (p) *Petre v. Duncomb*, 20 L. J., 478.

could not be sued thereon, as the giving of guarantees and undertakings of such a description was not within the usual course of business of attorneys; and the law, therefore, would raise no inference of any authority from the one partner to bind the other by such an undertaking. (s) But if the guarantee, when it has been given, is notified to the firm, and they do not dissent from it, or if it refers to a partnership transaction, and is given to secure the payment of goods supplied, or money advanced, to the firm, and received by the co-partnership, and added to the joint stock, or if it has been given to secure the performance of something within the ordinary scope and business of the firm, and which one partner generally has power to undertake for it on behalf of the firm, it binds all the partners, and all are liable to be sued thereon. (t)

SECTION II.

OF MARINE INSURANCE.

1144. *Of contracts of insurance.*^{*}—The contract of insurance is a contract whereby one of the contracting parties agrees to take upon himself, and protect the other from, the risks and accidents to which any particular property or any particular individual may be exposed, and covenants or promises, in consideration of a sum of money which the other contracting party pays or binds himself to pay to him as the price of the risk run, to indemnify the latter against these risks and accidents. The party who takes the

(s) *Hasleham v. Young*, 5 Q. B. 833; 13 L. J., Q. B. 205. *Brettel v. Williams*, 4 Exch. 629.

(t) *Ex parte Notte*, 2 Gl. & Jas. 306. *Sandiland v. Marsh*, 2 B. & Ald. 679. *Ex parte Gardom*, 15 Ves. 286.

risk upon himself, or undertakes to indemnify, is called the assurer or insurer, and commonly in our law, the underwriter, from his subscribing his name at the bottom of the contract; the party protected by the contract, the assured or insured; and the money paid as the price of the indemnity, the premium for the risk; whilst the contract itself, or rather the written instrument evidencing or constituting it, is called a policy of insurance. Many discussions have taken place respecting the precise nature of this contract. Pothier calls it a species of contract of sale. The assured, he says, are the vendors, the assurer the purchaser, and the thing sold is a risk attached to the thing assured. (*u*) Other writers make the contract a contract of letting and hiring; some declare it to be a contract of mandate; and others a contract of partnership. In our own law it is considered, so far as it relates to sea risks and risks of fire, to be a guarantee or contract of indemnity.

1145. *Mutual insurance* consists in the association of different proprietors of property exposed to the same risk, with a view of indemnifying at the common expense those members who suffer loss. The members of such an association are at the same time insurers and insured; and the engagement which each of them contracts with the association at large as an insurer is the consideration or price of insurance or indemnity which the society promises or guarantees to him in return. (*x*)

1146. *Policies of insurance.*—The owner of the property or interest insured generally pays to the insurer or underwriter a premium at a certain rate per cent.; and the latter then subscribes the ordinary

(*u*) Pothier, Contrat d'Assurance,

(*x*) Encyc. du Droit, ASSURANCE.

written or printed instrument, called a policy of insurance, whereby he expresses that he "doth make assurance" and cause the party "to be insured" in a certain sum, on certain specified property, for a certain voyage or for a certain time, against certain risks and perils which are enumerated and set forth in the policy. The policy is frequently preceded by a "slip," which is a short memorandum of the terms of the insurance, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But the slip is often nothing more than an offer or proposal of terms preliminary to the contract. (y) ¹

II47. *Voyage and time policies.—Valued and open policies.*—When the insurance is on a voyage from one port to another, without reference to time,

(y) *Rogers v. Macarthey*, Park Ins. B. & S. 556; 33 L. J., Q. B. 41. *Post*.
39. *Parry v. The Great Ship Co.*, 4

¹ This policy, it has been held, need not be in writing unless the act of incorporation of the insurers so require. *Baptist Church v. Brooklyn, &c., Ins. Co.*, 18 Barb. 69; 19 N. Y. 305; and see *Union Ins. Co. v. Commercial Ins. Co.*, 2 Curtis, C. C. 524, affirmed; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Cockerill v. Cincinnati Ins. Co.*, 16 Ohio, 148; *Courtney v. Miss. Ins. Co.*, 12 La. 233; *Berthoud v. Atlantic Ins. Co.*, 13 Id. 539; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Spitzer v. St. Mark's Ins. Co.*, 6 Duer, 6; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 600; *Smith v. Odlin*, 4 Yeates, 468; *Hamilton v. Lycoming Ins. Co.*, 5 Barr. 339; but see *Real Estate Ins. Co. v. Roessle*, 1 Gray, 336. The contract is signed by the insurers alone, but is binding upon both parties. *Insurance Co. v. Smith*, 3 Whart. 529; *Patapsco Ins. Co. v. Smith*, 6 Harr. & J. 165; that is to say, it becomes binding if the insurer subjects his property to the risk insured against, but not otherwise. *Taylor v. Fowell*, 3 Mass. 331; *Loring v. Proctor*, 26 Maine, 18; *Blanchard v. Waite*, 28 Id. 51; *Woodruff v. Columbus Ins. Co.*, 5 La. Ann. 697; *Perkins v. Washington Ins. Co.*, 4 Cowen, 645.

the policy is called a voyage policy; but when it is from one fixed period to another, such as "from the 1st of March, 1875, to the 1st of January, 1876," or for three, six, or twelve months, &c., the policy is a time policy. When the value of the property insured, as between the assured and the underwriter, is expressed on the face of the policy, the policy is called a valued policy. (z) When it is not so expressed, but is left to be estimated in case of loss, the policy is called an open policy. In the one case the declared value establishes the pecuniary interest and loss of the assured as between himself and the underwriter; and in the other the value has to be proved. "The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial;" and this must be fairly done, with a view of obtaining a fair indemnity; for, if the policy be enormously overvalued, that will be evidence of fraud. (a) In the absence, however, of fraud or wagering, a valued policy is valid, however largely in excess of the true value. (b) If the value declared is the value of a full cargo, and, at the time of the loss there was not a full cargo on board, the insurers are not liable for the full amount of the declared value, but only for the real loss, and the policy in such case must be treated as an open policy. (c); for, as the contract is strictly a contract of indemnity for a real loss, the law will not permit it to be made a means of profit and gain to one of the parties at the expense of the other.¹

(z) *Wilson v. Nelson*, 5 B. & S. 354; 287. *Barker v. Janson*, L. R., 3 C 33 L. J., Q. B. 220. P. 307.

(a) *Lewis v. Rucker*, 2 Burr. 1171. (c) *Tobin v. Harford*, 32 L. J., C. P.

(b) *Irving v. Manning*, 1 H. L. Cas. 134; 34 Ib. 37.

¹ *Post*, § 1151. The valuation stated in a valued policy is conclusive upon both parties. *Orient Ins. Co. v. Wright*, 23

When the insurance is on goods, to be thereafter declared and valued, the assured has the power, by duly declaring and valuing before knowledge of the loss, to make the policy a valued policy ; but, if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial. The declaration, when made, does not require the assent of the underwriters. It is generally put upon the policy for convenience ; but this is not necessary, nor is there any necessity for its being in writing. The making of the declaration is not a condition precedent which must be fulfilled by the assured before the liability of the underwriters attaches ; yet, in order to be available, it must be made and communicated to the underwriters, or some one on their behalf, before intelligence has

How. 401 ; *New York Ins. Co. v. Roberts*, 4 Duer, 141 ; *Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray, 214 ; *Hartshorn v. Shoe, &c., Dealers' Ins. Co.*, 15 Id. 240 ; *Sun Ins. Co. v. Wright*, Id. 412 ; *Edwards v. St. Louis Ins. Co.*, 7 Miss. 382 ; *Douville v. Sun Ins. Co.*, 12 La. Ann. 259. But the valuation in a policy is not evidence of value of the thing insured except between the parties to it. *Higginson v. Dall*, 13 Mass. 96. And the valuation of the whole is conclusive as to the value of a part unless otherwise provided in the policy itself. *Murray v. Columbian Ins. Co.*, 4 Johns. 302 ; *Mayo v. Maine Ins. Co.*, 12 Mass. 259 ; *Dumas v. Jones*, 4 Id. 647 ; *Walcott v. Eagle Ins. Co.*, 4 Pick. 127 ; *Mutual Ins. Co. v. Munro*, 7 Gray, 219 ; *Clark v. Ocean Ins. Co.*, 16 Pick. 295 ; *Brooks v. Oriental Ins. Co.*, 7 Id. 259 ; *Minturn v. Columbian Ins. Co.*, 10 Johns. 75. If the property has no value, it is a wagering policy, and the above rules of course do not apply (see next note) ; and so excessive or absurd valuation would be fraudulent, and avoid the policy. *Hersey v. Merrimack Co. Ins. Co.*, 7 Foster, 155 ; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411 ; *Catron v. Tenn. Ins. Co.*, 6 Humph. 185 ; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 473 ; *Robinson v. Manufacturers' Ins. Co.*, 1 Met. 143 ; *Gardner v. Col. Ins. Co.*, 2 Cranch, C. C 550 ; *Ocean Ins. Co. v. Fields*, 2 Story, 77.

been received of the loss of the subject-matter of insurance. If it is not so made and communicated, the policy becomes, as we have already seen, an open policy. (*d*) Where the loss of the ship is not the risk insured against, but the risk depends upon some other contingency not known to have happened the fact of the loss of the ship being known to both parties at the time the insurance is effected will not invalidate the policy; for the knowledge that will vitiate a policy must be a knowledge of the loss of the subject-matter of the contract. (*e*) When the premium is paid down and received at the time of the making of the contract, the policy is not usually signed by both parties, but only by the insurer; and in these cases, therefore, it partakes of the nature of a guarantee, the insurer warranting the safe arrival of the ship, cargo, or merchandise at the place of destination.¹

1148. *Insurable interest.—Wagering and gaming policies of insurance.*—By the 19 Geo. 2, c. 37, s. 1, it is enacted, that no assurance shall be made by any person on any ship, or on any goods or merchandise laden on board thereof, interest or no interest, or without further proof of interest than the policy, by way of gaming or wagering, or without benefit

(*d*) Harman v. Kingston, 3 Campb.
151. Robinson v. Touray, *Ib.* 159.

(*e*) Gledstanes v. R. Ex. Ass. Co., 5
B. & S. 797; 34 L. J., Q. B. 30. Mead
v. Davison, 3 Ad. & E. 307.

¹ A running policy is one that is open, and providing that the property to be insured shall be ascertained subsequently, and at certain times designated by indorsements on the policy itself. Newlin v. Insurance Co., 20 Pa. St. 1372; Neville v. Merchants' Insurance Co., 17 Ohio, 192. But these indorsements must be consistent with the policy itself; if inconsistent, the indorsement will govern. Protection Ins. Co. v. Wilson, 6 Ohio St. 553.

of salvage to the assurer; and that every such insurance shall be void. (*f*)¹ The fact of a person being named both shipper and consignee in a bill of lading is *primâ facie*, but not conclusive, evidence of an insurable interest in him. If he is a mere agent without lien on the goods, or possession of them as a bailee, or liability to account for their loss by the perils insured against, he has no insurable interest. (*g*) An insurance on profits of goods laden on board a vessel is an assurance on goods within the meaning of this statute. (*h*) Freight, or the profit derivable from the carriage of goods or the hire of a vessel, constitutes a good insurable interest; and so does the profit which the shipowner ordinarily makes from carrying his own goods in his own vessel to a distant market, or any profits fairly expected to be made in the due course of trade; (*i*)² also the special property which a carrier has in the goods entrusted to him to carry, or the interest which an executor has in the property of his testator before probate of the will has been granted, or the interest

(*f*) *Lowry v. Bourdieu*, 2 Doug. 223; 25 L. J., Ex. 337. *De Mattos v. North*, L. R., 3 Ex. 185.

(*g*) *Seagrave v. Union Marine Insurance Co.*, L. R., 1 C. P. 305; 35 L. J., C. P. 172. (*i*) *M'Swiney v. R. Ex. Ass. Co.*, 14 Q. B. 634; 18 L. J., Q. B. 193. *Chope v. Reynolds*, 5 C. B., N. S., 642; 28 L. J., C. P. 194.

(*h*) *Smith v. Reynolds*, 1 H. & N. J., C. P. 194.

¹ The rule is the same in the United States. See *Clark v. Ocean Ins. Co.*, 16 Pick. 295; *Amory v. Gilman*, 2 Mass. 13; *Stetson v. Mass. Ins. Co.*, 4 Id. 336; *Lord v. Dall*, 12 Id. 118; *King v. State Ins. Co.*, 7 Cush. 10; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 464; *Walcott v. Eagle Ins. Co.*, 14 Pick. 438.

² *Mumford v. Hallett*, 1 Johns. 433; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Alsop v. Com. Ins. Co.*, 1 Sumn. 451; *Adams v. Warren Ins. Co.*, 22 Pick. 163; *Paradise v. Sun Ins. Co.*, 5 La. Ann. 596; *Walcott v. Eagle Ins. Co.*, 4 Pick. 429.

which captors have in time of war in the prizes taken by them, (*k*) or which the crown has in prizes before condemnation, or the freight which the freighter of a vessel has paid in advance, or the legal and equitable interest which mortgagors and mortgagees have in the mortgaged property, or the interest which a party has in the security of property the safety of which he has guaranteed for some determinable period, or the interest which a purchaser has in specific, ascertained chattels bought by him, but which remain in the hands of the vendor, covered by the lien of the latter for the unpaid purchase-money, (*l*) or which the charterer of a vessel, or the hirer or lessee of personalty or realty, has in the property entrusted to him to be used for hire. A defeasible or inchoate interest may be insured as well as an absolute and perfect interest, but not a mere expectancy.

m) The wages of labor can not be assured; for it would take away the stimulus to exertion to secure to the workman the payment of his wages at all events, and would be contrary to public policy. Formerly the interest which the underwriter himself acquires in the safety of the property he has insured could not have been re-insured; (*n*) but by the 27 & 28 Vict. c. 56, s. 1, re-insurance may now be effected upon any ship or vessel, or upon any goods.

Whenever the policy is effected on property valued at a certain sum, and it is expressly provided that the policy shall be deemed sufficient proof of interest, the insurance is in principle an insurance

(*k*) *Le Cras v. Hughes*, Park Ins.

568. *Boehm v. Bell*, 8 T. R. 154.

Irving v. Richardson, 2 B. & Ad.

193.

(*l*) *Sparkes v. Marshall*, 3 Sc. 172.

(*m*) *Devaux v. Steele*, 6 Bing. (N. C.)

371. *Stockdale v. Dunlop*, 6 M. &

W. 233.

(*n*) 19 Geo. 2, c. 37.

"interest or no interest," and void within the statute.

(*o*) As no person can sue upon a policy who is not really interested therein, it follows that, if the assured assigns away his interest after the making of the policy, he can not maintain an action upon it for his own benefit. He can sue upon it only in one way, *i.e.*, as a trustee for the assignee in a case where the policy is handed over to him upon the assignment. (*p*) But, wherever he sustains a *bonâ fide* loss by the destruction of the subject-matter of the insurance, he is entitled to be indemnified, and may sue upon the contract; and the court will not allow underwriters to get rid of their liability merely because the name of the party they have agreed to indemnify is not on the register. (*q*) If the policy is on goods lost or not lost, the indemnity extends to past as well as future losses; and it is no answer, therefore, to an action on such a policy to say that the interest was not acquired until after the loss. (*r*)

1149. *Requisites of the contract.*—Contracts of insurance must be expressed in a policy which must specify the particular risk or adventure, the names of the subscribers, and the sums insured. (*s*) If any of these particulars are omitted, or if the policy is for any time exceeding twelve months, it is void. (*t*) And no policy can be pleaded or given in evidence unless it is duly stamped, except in the case of mutual insurances or of policies made abroad. (*u*) But the slip,

(*o*) *Murphy v. Bell*, 4 Bing. 567; 1 M. & P. 493.

(*p*) *Powles v. Innes*, 11 M. & W. 10.

(*q*) *Hutchinson v. Wright*, 27 L. J., Ch. 835.

(*r*) *Sutherland v. Pratt*, 11 M. & W. 312.

(*s*) 30 Vict. c. 23, s. 7. *Reid v. Allan*, 4 Exch. 326.

(*t*) 30 Vict. c. 23, ss. 7, 8.

(*u*) 30 Vict. c. 23, s. 9. As to the making of alterations in the policy, see 30 Vict. c. 23, s. 10. By sect. 12 insurances by carriers by sea are to be deemed to be contracts for sea insurance.

although not valid as a contract, may be given in evidence to show the intention of the parties. (*x*)¹ By the 28 Geo. 3, c. 56, it is enacted that it shall not be lawful for any person to effect a policy of insurance upon any ship, or upon any goods, merchandise, or property whatever, without first inserting in such policy the name or the usual style and firm of one or more of the persons interested in such insurance, or of the consignor or consignee, or of the person in Great Britain receiving the order to insure and effecting the insurance, or of the person who shall give the order to the agent immediately employed to negotiate the policy. (*y*) If the policy is effected by a policy broker or agent "for the benefit of all parties interested," these last may become privy to the contract by adopting it; (*z*) and any person who acquires an interest in the subject-matter of the insurance, whilst it is covered and protected by such a policy, may sue thereon for an indemnity against loss. (*a*)² The subject-matter of the insurance must be correctly and clearly described, so that the things insured may be

(*x*) *Ionides v. The Pacific Fire and Marine Insurance Co.*, L. R., 7 Q. B. 517; 41 L. J., Q. B. 190. And see *Fisher v. The Liverpool Marine Insurance Co.*, L. R., 8 Q. B. 469; 42 L. J., Q. B. 224.

(*y*) *Wolff v. Horncastle*, 1 B. & P.

316. *Mellish v. Bell*, 15 East, 6 *Hibbert v. Martin*, 1 Campb. 538.

(*z*) *Hagedorn v. Oliverson*, 2 M. & S. 490. *Barlow v. Leckie*, 4 Moore, 8. *Stirling v. Vaughan*, 11 East, 619.

(*a*) *Sutherland v. Pratt*, 11 M. & W. 296.

¹ Any competent parties may contract, but: insurance for the benefit of an alien enemy is void. ² *Parsons on C.* 360. Although a trade or transaction otherwise unlawful by reason of war, may be made lawful by special license. *Id.*

² *Rogers v. Traders' Ins. Co.*, 6 Paige, 543. And the policy expressing that the insurance is made by A. B. for ——— is an insurance for those parties interested in the property whose names were intended to be filled in the blank space. *Turner v. Burrows*, 8 Wend. 150; 24 *Id.* 276.

ascertained and identified, and so that it may be known to what articles the risk attaches, whether it be to the ship, the freight, or the whole or part of the cargo. (*b*)

1150. *Matters and things covered by the policy.*—

If a person insures a cargo to be laden on board on the Brazilian coast, the policy will not cover and protect a cargo taken on board on the coast of Africa. (*c*) If the ship only is insured, the policy will not, of course, cover and protect the merchandise laden on board; (*d*) and, if the insurance is merely on "the ship's tackle and furniture," it will not cover stores, harpoons, lines, and fishing-tackle, put on board to be used in the whale fishery, (*e*) unless the vessel is described in the policy as a whaling vessel, and the insurance is declared to be made on a whaling adventure. The provisions of the crew are covered by a policy on "the furniture of the ship." (*f*) But, if a ship is disabled and puts into port to re-fit, or is detained by an embargo, the extraordinary wages and provisions for the crew during the detention can not be charged against the underwriter of a policy on the ship, cargo, and furniture. (*g*) A mere mistake in the name of the ship will not avoid the policy and discharge the underwriters, if the identity of the vessel with the vessel named in the policy is clearly established, and the underwriters have in nowise been prejudiced by the mistake. (*h*) Whatever is considered, by the custom and usage of trade, to be comprehended under the term "goods, specie, and effects" will be covered by a policy

(*b*) *Crowley v. Cohen*, 3 B. & Ad. 485.

(*c*) *Robertson v. French*, 4 East, 130.

(*d*) *Molloy*, b. 2, c. 7, s. 8.

(*e*) *Hoskins v. Pickersgill*, Park Ins. 126.

(*f*) *Brough v. Whitmore*, 4 T. R. 206.

(*g*) *Robertson v. Ewer*, 1 T. R. 132.
De Vaux v. Salvador, 4 Ad. & E. 420.

(*h*) *Le Mesurier v. Vaughan*, 6 East, 385.

upon such property. Money expended by the captain in the course of the voyage for the use of the ship, and for which respondentia interest was charged, is in some trades included by custom under these words. (*i*) A general policy of insurance on goods laden on board a particular vessel extends to all goods which form part of the cargo, and will cover and protect goods laden on deck, provided it is customary for goods to be so laden, and the risk of the insurer is not thereby increased beyond what must be presumed to have been contemplated at the time the insurance was effected. (*k*) If the insurance is upon all goods that may be laden on board a particular vessel on an outward and homeward voyage, the policy will attach on any goods that may be carried out or brought back on board such vessel. (*l*) If the assurance is on goods from "any port or ports in the East Indies" to "any port or ports" in this country, the insurance will cover any goods that may be shipped from the East Indies for England, whatever vessel may be selected for their conveyance. (*m*) And, if an insurance is effected on goods on board "any ship or ships" that may sail during a particular period from one port to another, or from one part of the world to another, and goods of the assured are laden on board different vessels, some of which arrive safe and others are lost, the assured will have a right to apply the policy to the ships that are lost, and the underwriters can not discharge themselves from liability by showing that ships answering the description in the policy have arrived safe. (*n*)¹

(*i*) *Glover v. Black*, 1 Park Ins. 10

(*l*) *Grant v. Paxton*, 1 Taunt. 463.

(*k*) *Da Costa v. Edmunds*, 4 Campb.

(*m*) *Hunter v. Leathley*, 10 B. & C.

242.

858.

(*n*) *Kewley v. Ryan*, 2 H. Bl. 343.

¹ But in the absence of fraud, a policy of marine insu-

Oral evidence is admissible to explain the customary meaning of terms used in a particular trade but not to add a new term to the contract, or to show that more things were intended to be insured than are ordinarily or customarily included under the express term of the contract.

1151. *Implied warranties.—Seaworthiness of the vessel.—Time policies and voyage policies.*—There is an implied warranty in voyage policies on the part of the insurer that the ship insured is seaworthy, “tight, staunch, and strong,” at the time of the commencement of the voyage; but in the case of time policies there is no such warranty, although the time policy be effected upon an outward-bound ship, lying in a British port, where the insuring owner resides, or on a new vessel about to undertake her first voyage. (o)¹ Before the assured, however, can recover against the underwriter upon a voyage policy, “he is bound to prove, not only that the ship was tight, staunch and strong, but that she was properly equipped with sails and stores, and that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching, and, if they are not complied with, so that the perils are enhanced, from whatever cause this may arise, and though no

(o) *Fawcus v. Sarsfield*, 6 Ell. & Bl. B. 240. *Gibson v. Small*, H. L. C., 4, 200; 25 L. J., Q. B. 249. *Thompson* 353. *Small v. Gibson*, 16 Q. B. 158. *v. Hopper*, 6 Ell. & Bl. 172; 25 L. J., Q. *Michael v. Tredwin*, 17 C. B. 551.

rance will be liberally construed, and matter intended by the insured to be brought within the terms of the policy will be included in it. *Ruan v. Gardner*, 1 Wash. C. C. 145; *Sea Ins. Co. v. Fowler*, 21 Wend. 600; *New York Ins. Co. v. Roberts*, 4 Duer, 141; *Ballard v. Merchants' Ins. Co.*, 9 La. 258; *Sorbe v. Merch. Ins. Co.*, 6 Id. 185; *Murray v. Columbia Ins. Co.*, 11 Johns. 302.

¹ See *ante*, note 1, p. 660, vol. ii.

fraud was intended by the assured, the underwriters have a right to say they are not liable;" (*p*) but the assured is not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk. (*q*)¹ The insurer is entitled to expect that the

(*p*) *Ld. Ellenborough, Wedderburn v. Bell*, 1 *Campb.* 1. *Douglas v. Scougal*, 4 *Dow.* 269. (*q*) *Jenkins v. Heycock*, 8 *Moo., P. C.* 361. *Biccard v. Shepherd*, 14 *Moo., P. C.* 471.

¹ *Id.* The implied warranty of seaworthiness is of the foundation of the contract, and includes everything used in the structure and fitting of the ship; 2 *Parsons on C.* 406; her build and fastenings; *Id.*; spars, sails, rigging; *Id.*; boats, cables, and anchors; *Id.*; all usual and proper papers and documents; food and water of sufficient quality and quantity; *Fontaine v. Phoenix Ins. Co.*, 10 *Johns.* 58; *Moses v. Sun Ins. Co.*, 1 *Duer*, 159; *Kettell v. Wiggin*, 13 *Mass.* 68; but a non-compliance with the provisions of a statute requiring the carrying of a certain quantity of water under deck does not of itself render the vessel unseaworthy; *Warren v. Manuf. Ins. Co.*, 13 *Pick.* 518; *Deshon v. Merchants' Ins. Co.*, 11 *Met.* 209; and the mere fact that all the water on board is carried on deck does not, it has been held, of itself, as matter of law, render the vessel unseaworthy, although it is a fact tending to prove unseaworthiness; *Deshon v. Merchants' Ins. Co.*, 11 *Met.* 208; fuel, charts, and such furniture and implements as are needed for safe navigation; 2 *Parsons on C.* 406; ballast; *Deblois v. Ocean Ins. Co.*, 16 *Pick.* 303; pilotage, and proper stowage of the cargo; *Chase v. Eagle Ins. Co.*, 5 *Id.* 51; *Cincinnati Ins. Co. v. May*, 20 *Ohio*, 211; and a master, officers, and crew, competent in number and ability; *Id.*; 2 *Parsons on C.* 406; *Walden v. New York Ins. Co.*, 12 *Johns.* 136; *Cruder v. Pennsylvania Ins. Co.*, 92 *Wash. C. C.* 339; *Draper v. Commercial Ins. Co.*, 4 *Duer*, 234; *Dow v. Smith*, 1 *Caines*, 32; *Silva v. Low*, 1 *Johns. Cas.* 184; *Cruder v. Philadelphia Ins. Co.*, 2 *Wash. C. C.* 262; and it is generally necessary to have an officer on board competent to take the master's place in case of an emergency; *Walden v. N. Y. Ins. Co.*, 12 *Johns.* 136; *Treadwell v. Union Ins. Co.*, 6 *Cow.* 270; *Copeland v. New England Ins. Co.*, 2 *Met.* 432. The seaworthiness is for the time, place, and voyage insured for. *M'Lanahan v. Universal Ins. Co.*, 1 *Pet.* 184

shipowner will do all that can reasonably be expected to be done to limit the risk covered by the insurance to those perils incidental to navigation which the care and skill of man can not provide against. But, where the nature of the adventure and the size and class of vessel to be employed are known to both parties, the implied warranty of the shipowner can not be carried further than that he shall do his utmost to make the particular vessel as fit for the voyage as she can possibly be made. Therefore, in sending a river steamer across the ocean, the warranty of seaworthiness is complied with if the nature of the adventure is disclosed to the underwriter, and the owner does as much as can reasonably be done to make her fit for the voyage, though she may not be considered seaworthy in the ordinary sense of the term as applied to ordinary seagoing vessels. (r)

Non-compliance with the requirements of the statutes respecting the engagement of the crew does not render a vessel unseaworthy; it must be shown that the crew was actually insufficient in number, or that there was a want of capacity in the master or other officers. (s) If a ship becomes leaky or founders without any adequate cause, the presumption is that the vessel was unseaworthy at the time she put to sea. (t) If the vessel is not properly found with

(r) *Burges v. Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17. *Clapham v. Langton*, 34 L. J., Q. B. 46.

(s) *Redmond v. Smith*, 8 Sc. N. R. 270.

(t) *Davidson v. Burnand*, L. R., 4 C. P. 117.

Cobb v. New England Ins. Co., 6 Gray, 192; *Brown v. Girard*, 4 Yeates, 115; *Bell v. Reed*, 4 Binn. 127; and see *Capen v. Washington Ins. Co.*, 12 Cush. 517; *Hazard v. New England Ins. Co.*, 1 Sumn. 218; *American Ins. Co. v. Ogden*, 15 Wend. 532; 20 Id. 287; *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25; *Starbuck v. New England Ins. Co.*, 14 Pick. 198.

cables, anchors, and ground tackling, she is unseaworthy; (*u*) and so she is if she has an insufficient crew, or an incompetent captain, or has no pilot on board at those parts of the voyage where a pilot is required; (*x*) but if a competent master, and crew, and pilot, have been provided in the first instance, the insurer is not discharged by their negligence or want of skill; "for there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew or pilot during the whole course of the voyage." (*y*) If the master is unable, from stress of weather or other causes, to procure a pilot, this is a risk covered by the policy, and the insurer remains liable. (*z*) And, if by accident or mistake a vessel sails out of port in an unseaworthy state, and the defect is remedied before any loss occurs, and she then sails again in a seaworthy state, the insurer will be liable on the policy for a subsequent loss. (*a*) The parties may make any stipulations they think fit in the policy respecting the seaworthiness of the vessel; and the insurer may consent to take her as seaworthy, or insure conditionally, on certain repairs being done. The assured also impliedly warrants that a loss shall not happen through his own personal default, and that he will himself do nothing to enhance the risk. If he neglects to have the ship properly documented according to her national character, or if he furnishes her with simulated papers without the knowledge of the underwriters, these last

(*u*) *Watson v. Clark*, 1 Dow. 336.
Parker v. Potts, 3 Ib. 23. *Wilkie v.*
Geddes, Ib. 57.

(*x*) *Tait v. Levi*, 14 East 481.

(*y*) *Sadler v. Lixon*, 8 M. & W.
 395; 5 M. & W. 415.

(*z*) *Phillips v. Headlam*, 2 B. & Ad
 383.

(*a*) *Weir v. Aberdeen*, 2 B. & Ald.
 320. But see *The Quebec Marine In-*
surance Co. v. The Commercial Bank
of Canada, L. R., 3 P. C. 234.

will be released from all liability upon the policy in respect of losses occasioned by the neglect, as such increased risk is not the risk they intended to take upon themselves. (*b*)

If the insurance attaches before the voyage commences, it is enough if the state of the ship is commensurate, with the then risk; and, if the voyage is such as to require a different complement of men or state of equipment in different parts of it, as if it be a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at the time when she enters upon each stage of the navigation properly manned and equipped for it. (*c*) In the case of an insurance on goods there is no implied warranty that the goods are fit to encounter the ordinary risks or vicissitudes of the voyage; and it is no answer to the claim of the insurer to say that the goods were in an unfit condition to be shipped, unless it can be shown that the loss arose from that unfitness. (*d*) In the case of an insurance on goods on board an English ship there is no implied warranty that the ship shall continue English. (*e*)

1152. *Express warranties.*—Every positive averment or allegation on the face of a policy of insurance of facts material to the risk, forming the basis of the contract, “amounts to a warranty; and, if such allegation be not strictly true, the assured can not recover on the policy, to whatever cause the loss be owing, whether the loss be connected with the subject of

(*b*) *Oswell v. Vigne*, 15 East, 70. *Pipon v. Cope*, 1 Campb. 434.

(*c*) *Dixon v. Sadler*, 5 M. & W. 414; 8. M. & W. 899. *Bouillon v. Lupton*, 15 C. B., N. S., 138; 33 L. J., C. P. 37. *The Quebec Marine Insurance Co. v*

The Commercial Bank of Canada, ante.

(*d*) *Koebel v. Saunders*, 17 C. B., N. S., 78; 33 L. J., C. P. 310. *Boyd v. Dubois*, 3 Campb. 132.

(*e*) *Dent v. Smith*, L. R., 4 Q. B. 414; 38 L. J., Q. B. 144.

such warranty or wholly independent of it ; for it is a condition on which the contract is to take effect which failing, the contract fails." (*f*) But every representation inserted in a contract does not, as we have before seen, amount to a warranty. A written memorandum, statement, or representation does not become part of the policy from being folded up in it, or pinned on thereto ; (*g*) but, if the policy refers to it or to any separate writing or memorandum, the two documents may then be placed in juxtaposition and read together. (*h*) When there is a warranty that the vessel " is well " on the day the insurance is effected, the warranty is complied with if the vessel was safe at any time on the day named, so that, if the vessel, should have been lost in the morning of that day and the insurance be effected in the afternoon, the underwriters will be liable. (*i*) The warranties most frequently met with in maritime policies are warranties of the time of sailing of departure with convoy, and warranties of neutrality.

II53. *Time of sailing.*—When the vessel is warranted to sail by a particular day, the underwriter will be discharged if she does not sail at the time appointed ; and the circumstance of her being prevented by inevitable accident, or restraint, or detention of princes, does in nowise exonerate the assured from the consequences of his breach of contract. (*k*) When the vessel has left her loading port with all her cargo and clearances on board, with no other object in view than to get in the safest way she can to the

(*f*) *LE BLANC, J.*, De Lothian v. 254. *Worsley v. Wood*, 6 T. R. Henderson, 3 B. & P. 515. De Hahn 710.
 v. Hartley, 1 T. R., 343. Ollive v. (*i*) *Blackhurst v. Cockell*, 3 T. R. Booker, 1 Exch. 423. 360.
 (*g*) *Pawson v. Ewer*, 1 Doug. 11, n. (*k*) *Hore v. Whitmore*, 2 Cowp
 (*h*) *Routledge v. Burrell*, 1 H. Bl. 784.

port of delivery, this is a sailing within the meaning of the warranty, although she does not proceed straight to sea, but sails to some general place of rendezvous to wait for convoy. (*l*) But she must be actually out of port or be sailing down a river towards the sea, and have made a bonâ fide commencement of the voyage, in order to satisfy a warranty to sail. (*m*) If the warranty be to sail after a specific day, and the ship sails before, or if it be not to sail during a particular period of the year, and the ship sails during the prohibited period, the liability on the policy does not attach, as the risk is a different risk from the one agreed to be run by the underwriter. (*n*)¹

1154. *Sailing with convoy.*—If a vessel warranted “to depart with convoy” is proceeding from her loading port to the nearest place of rendezvous for convoy, and is captured, the underwriters are nevertheless responsible, as the vessel was fulfilling the warranty at the time of the capture in the only mode in which it could be fulfilled, and was proceeding to secure convoy, and departing with convoy, in the mercantile, sense of the term, and according to the usage of trade. (*o*) A warranty that the vessel shall “depart with convoy” does not mean merely that she is to sail out of port or from the place of general rendezvous with convoy, but that she is to have convoy for the whole voyage insured, unless prevented by stress of

(*l*) *Bond v. Nutt*, 2 Cowp. 601. *M. & S.* 456. *Graham v. Barras*, 5 B. Wright v. Shiffner, 11 East, 515. & Ad. 1011.
Thellusson v. Ferguson, 1 Doug. 361. (*n*) *Vezian v. Grant*, 2 Park. Ins. 670.
Cockrane v. Fisher, 1 C. M. & R. 809. Colledge v. Harty, 6 Exch. 205.
Lang v. Anderdon, 3 B. & C. 495.
(*m*) *Moir v. R. Exch. Ass. Co.*, 4 (*o*) *Anderson v. Pitcher*, 2 B. & P. Campb. 84. *Ridsdale v. Newnham*, 3 164.

¹ See 2 Parsons on Contracts, 400.

weather, (*p*) or unless it is the usage for ships to be convoyed only part of the distance, and convoy beyond a certain point is not deemed necessary and is not provided by the government. (*q*) The mode and nature of the convoy are regulated by merchantile usage; and it is never considered necessary for the ship to be convoyed throughout by the same vessels, there being in general relays of convoy from stage to stage. (*r*)

1155. *Neutrality*.—Whenever property is insured as neutral property which is not neutral property, there is no contract, and no action can be maintained on the policy. But, if the property is neutral at the time the insurance is effected and the risk attaches on the policy, the circumstance of its ceasing to be so at a subsequent period does not affect the underwriter's liability. (*s*) "If a war break out the next day, the underwriter is liable." (*t*) It is no answer to an action on a policy of insurance that the goods were contraband of war, and were shipped for the purpose of being sent to a belligerent port, unless facts establishing a fraudulent concealment are set forth. (*u*) The sentence of a foreign court of admiralty, or prize court, falsifying the warranty of neutrality, will be conclusive evidence of the breach thereof, (*x*) unless it appears on the face of such sentence that the grounds of the adjudication are erroneous, or the adjudication

(*p*) Jefferyes v. Legendra, 1 Show. 297. Lilly v. Ewer, 1 Doug. 72.

(*q*) D'Eguino v. Bewicke, 2 H. Bl. 551.

(*r*) De Garey v. Clegget, 2 Park. Ins. 708.

(*s*) Eden v. Parkison, 2 Doug. 732. And see Dent v. Smith, L. R., 4 Q. B. 414; 38 L. J., Q. B. 144.

(*t*) Saloucci v. Johnson, 2 Park. Ins. 716.

(*u*) Hobbs v. Henning, 34 L. J., C. P. 117; 17 C. B., N. S., 791. And see Chavasse, *ex parte*, 34 L. J., Bk. 17.

(*x*) Bolton v. Gladstone, 5 East, 155. Baring v. Clagett, 3 B. & P. 201. Garrels v. Kensington, 8 T. R. 230.

itself is involved in doubt and ambiguity. (y) It has been held that an American by birth, who has resided for some years with his family in England, going occasionally to America, is so far to be considered a British subject that, if a ship of his be warranted American property, it is not to be deemed so, though the vessel was built in America and registered there. (z)¹

(y) *Dalgleish v. Hodgson*, 5 M. & P. 407; 7 Bing. 504. *Hobbs v. Henning*, *supra*. (z) *Tabbs v. Bendelack*, 3 B. & P. 207, n.

¹ The ship and cargo are distinct as to neutrality. The *Nereide*, 9 Cranch, 388. Property held in trust for a belligerent is belligerent property. *Murray v. United Ins. Co.*, 2 Johns. Cas. 168. But the mere right of a belligerent to stop goods in transitu does not make the goods belligerent. The *Merrimack*, 8 Cranch, 317. A ship is supposed to carry such papers as are necessary and competent to prove her neutrality; *Blagge v. New York Ins. Co.*, 1 Caines, 549; *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *Griffith v. Ins. Co. of North America*, 5 Binn. 464; *The Success*, 1 Dods. 132; *Catlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594; *Calbreath v. Gracy*, 1 Wash. C. C. 219; although leave is sometimes granted to carry simulated or false papers, and an established usage might have the same effect; 2 *Parsons on C.* 399; citing *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506, per MARSHALL, C. J.; *Calbreath v. Gracy*, 1 Wash. C. C. 219, per WASHINGTON, J; it is a breach of this warranty if any rightfully-demanded search is resisted; *Snowden v. Phoenix Ins. Co.*, 3 Binn. 468; *Brown v. Union Ins. Co.*, 5 Day, 1; or if a rescue is attempted; *McLellan v. Maine Ins. Co.*, 12 Mass. 246; *Brown v. Union Ins. Co.*, 5 Day, 1; *Robinson v. Jones*, 8 Mass. 536; or if the neutral ship seek belligerent protection; *The Julia*, 8 Cranch, 181; *The Joseph*, 1 Gallis. 548; unless these are justified by necessity; 2 *Parsons on C.* 399. The warranty of neutrality extends no further than the interest of the assured. *Livingston v. Maryland Ins. Co.*, 6 Cranch, 278. England has always maintained the principle that a country which in time of peace confines the trade of its colonies to its own subjects can not during a war, open such trade to a neutral, while the United States has maintained exactly the reverse rule upon the subject.

1156. *Fraudulent misrepresentation.*—Oral evidence of representations and statements made at the time the policy was effected are inadmissible in evi-

“If the rule that prohibits to neutrals any trade with the enemy during the war, from which they were permanently excluded in time of peace,” says DUER, J., “is to be considered as a component part of the law of nations, it evidently rests upon the same principle as the interdiction of trade with a blockaded port: namely, that the act of the neutral has a direct tendency to relieve the belligerent country with which he trades from the pressure of existing hostilities. It is presumed that it is only the pressure of the war that opens the trade, and that to give relief from this pressure is the necessary effect of neutral interference. It is doubted by none that where neutrals, by a special indulgence, are permitted to engage, during a war, in a commerce of the enemy, that is purely national, and from which foreigners, as such, are excluded in war, as well as in peace, the property so employed is necessarily impressed with a hostile character. It shares the character of the commerce into which it is incorporated. *The Princessa*, 2 Rob. 52; *The Anna Catharina*, 4 Id. 107; *The Rendsborg*, Id. 121; *The Vrow Anna Catharina*, 5 Id. 15; 2 *Wheaton’s Rep.*, Appen. 29; Sup. 450-1. But the rule we are considering goes much further. It asserts that where a commerce that in time of peace was a monopoly, is thrown open by the enemy, in time of war, to all nations without reserve, by a general, and on its face a permanent regulation, neutrals have no right to avail themselves of the concession; but that their entrance into the trade thus opened is a criminal departure from the impartiality they are bound to observe. (In *The Ebenezer*, 6 Rob. 255, a French regulation opening the coasting trade was declared, in terms, to be permanent; but Sir WILLIAM SCOTT said, that the court would not act on the credit of such declarations, but would adhere to its own principle, that the trade was unlawful.) It has been the general policy of the European powers to confine exclusively to their own ships and subjects the trade between their own ports, and between the mother-country and its colonies; consequently, if the rule in question is an admitted principle in the law of nations, when neutrals engage in the coasting or colonial trade of the belligerent state which is first opened to them during the war, all the property so employed is justly liable to confiscation by the opposite belligerent. But it is far from being true that

dence to control, alter, or affect the liability upon the policy, unless they are fraudulent representations. (a) All material statements and representations which are

(a) *Weston v. Emes*, 1 Taunt. 115.

the rule is an established or admitted principle. It was, indeed, enforced in a modified form, by the English courts of admiralty, during the wars of 1793 and 1801, with great severity, and the confiscation of a vast number of American ships, with valuable cargoes of colonial produce, was a principal fruit of their decrees; but these proceedings drew from the government of the United States an earnest and energetic remonstrance. The doctrine that they asserted, so far from being admitted, as sanctioned by the law of nations, was rejected and denounced by our government as a modern and violent innovation, unjust in its principle and ruinous in its application. Mr. Monroe's letter to Lord Mulgrave, Sept. 23, 1805; Mr. Madison's letter to Messrs. Monroe and Pickney, May 11, 1806. From the grounds then assumed, on full deliberation, and maintained, with signal ability, there is no reason to believe that the government of the United States will ever depart. It is, therefore, a question of much interest whether the English rule can be justly deemed a part of the general and permanent law of nations, or is to be regarded as an interpolation, that the government of a neutral state, anxious to protect the rights and interests of its citizens, is bound to resist. It is my deliberate conviction that the latter is its true character; and the grounds of this conviction I shall attempt, briefly, to explain. The rule in question is not sanctioned by authority, or by any real evidence of an ancient or general usage. 1. Not even an illusion to its existence is to be found in any writer on the public law previous to the year 1793. It is true that most of these writers have treated the law of capture in a hasty and superficial manner; but of the judicious Bynkershoek this can not be truly said. His elaborate treatise on the rights of war was intended to exhaust the subject, and his silence as to the illegality of the trade into which neutrals are admitted in time of war, but from which they are excluded in time of peace, is conclusive to show that no rule declaring the illegality was then known or conceived to exist. 2. The evidence of a corresponding usage will be found, on examination, to be very deficient and unsatisfactory. It is, indeed, asserted that by an ancient rule

false to the knowledge of the party making them are fraudulent, and may be proved by oral testimony in order to deprive the plaintiff of his right of action

generally adopted and enforced by the powers of Europe, the trade of neutrals between the ports of the enemy during a war was strictly prohibited, and the property so employed liable to confiscation; and this assertion is attempted to be proved by a reference to the provisions of certain treaties in the seventeenth century between Great Britain and other European powers. Thus the treaties between England and Holland of 1668 and 1674 contained express stipulations giving to each party the liberty to trade between the ports of the enemy in the same country during a war; and it is said to be a fair, if not a necessary, inference that the liberty thus given was a relaxation of an existing rule by which the trade was prohibited. But there is the clearest proof that this inference is groundless. We have the positive testimony of the British statesman who negotiated these treaties, that these provisions were considered by him, not as altering, but as declaratory of, the pre-existing law. Sir William Temple's Works, 313. It is doubtless true that Holland asserted the opposite rule; but its denial by England conclusively proves that it was not an admitted or established principle. The argument, however, founded on these treaties is still more effectually repelled by the opposite stipulations of a subsequent treaty, in which Denmark on the one side and England and Holland on the other were the contracting parties. This treaty was concluded in 1691, during a war against France, in which England and Holland were allied, and Denmark was neutral. It prohibits in terms the transportation of goods on board Danish vessels from one French port to another—a prohibition useless and nugatory, if such voyages were known to be interdicted by the existing law or practice of nations. The prohibition of a law, unless its sole object is to impose an additional penalty, is always construed as evidence that the act prohibited was previously lawful. The permission of an act is only evidence that its legality was regarded as doubtful. In the present case even the weakest inference is sufficient to disprove the existence of a known and established usage. The French ordinances of 1704 and 1744, it has been intimated, are founded on the basis of the rule in question, and imply its existence and legality. Valin's Comment. 248, 250; 1 Kent's Comment. 82. But these ordinances go much further; they

upon the contract. (b) The misrepresentation will be of a material fact, and will avoid the policy, if it be an assertion in time of war that the ship will sail with

(b) *Macdowall v. Fraser*, 1 Doug. 260.

confiscate neutral ships having enemy's property on board, or any of the manufactures or products of the enemy's country, or sailing from an enemy's port to any other port than one of their own nation. In short, they prohibit all the commerce of neutrals with the enemy, except in a direct trade; and in their main provisions, instead of being evidence of the existing law, are subversive of its best established principles. They, indeed, afford a striking proof of that injustice towards neutrals of which the government of France has too often been guilty; but in a controversy relative to the rights of neutrals have no claim to authority. 3. It is admitted by all that the records of the English admiralty afford no evidence of the condemnation of neutral ships as engaged in the colonial or coasting trade of the enemy until the war of 1756, and this admission is alone sufficient to refute the allegation of the antiquity and general reception of the rule. The rule as then enforced was certainly novel; but it is not necessary to deny that if it was then submitted to by the neutral nations whose interests were immediately affected, was constantly maintained by England during subsequent wars without complaint or remonstrance from the other powers of Europe, and was substantially the same as that adopted in 1793, it may be justly considered as having become incorporated, by general consent or acquiescence, into the national law of Europe. But the evidence is that the rule when first introduced, instead of commanding a ready acquiescence, encountered a strenuous resistance,—that, during the American War, the only subsequent war that intervened, instead of being maintained by the British government, it was by its highest tribunal explicitly renounced and abandoned; and, finally, that the rule as originally enforced, so far from being substantially the same, differed widely from that subsequently adopted. So far as relates to the coasting trade, the rule of 1756 merely prohibited the trade of neutral ships in freight between the ports of the enemy—the transportation of enemy's property from one of his ports to another—and the penalty which in these cases was then inflicted was not the confiscation of the ship, but only the forfeiture of the freight. It is true that, in the war of 1756, many Dutch ships engaged in the colonial trade of France were condemned with

convoy or in company with other vessels, and carry a certain force. (c) If the representation is true in substance the policy will not be avoided, although it may

(c) *Edwards v. Footner*, 1 Campb. 530.

their cargoes; but the whole ground of the condemnation appears to have been that the commerce in which they were employed was strictly national, and that they had become, by adoption, enemy's ships. At no period of that war did France abandon the principle of her colonial monopoly, or the system arising out of it. Hence a neutral ship, found in the prosecution of that trade which, under the existing laws, could be only a French trade, open only to French vessels, became, or to speak more correctly was legally presumed to be, a French vessel. This doctrine differs essentially from that on which the rule of 1793 was founded and vindicated, and which I shall next proceed to examine. As the rule of 1793 derives no support from previous authority or usage, so it will be found, if I mistake not, to be quite as indefensible on principle; or defensible only on grounds that, if admitted to be just, would subject the whole commerce of neutrals to the mercy of the belligerent powers. It is asserted that neutral nations, as they are permitted to enjoy the whole of the trade to which they were entitled in time of peace, can sustain no injury by their exclusion from that which is first opened to them by the pressure of a war; they are merely debarred from a benefit they had no right to claim or expect. But the assertion is wholly groundless, and the apparent equity of the rule that limits them to their accustomed trade, is certainly delusive. No rule can be just that is not equal, and the equality here is merely nominal. If it be just that neutrals should be limited in time of war to the trade they had been accustomed to enjoy in time of peace, they should be permitted to enjoy the whole of that customary trade in the whole of its customary extent. Their rightful traffic in peace, should be the criterion and measure of their rightful traffic in war. But how widely different is the fact! A maritime war annihilates at once all their trade in articles—a copious list!—that are, or may become, from their destination, contraband of war. It destroys, in effect, all their carrying trade in the transportation of enemy's property. The vexatious delays and expenses that are certain to result from the exercise of the belligerent rights of visitation and search are alone a serious obstruction to their commerce; and, above all,

be incorrect in minor details; nor will the policy be avoided if it is merely a representation of the parties own expectation, opinion, and belief; or if it is imma-

when on one side there is a preponderance of naval force, they may be excluded from many, perhaps all, of the principal ports of the opposite belligerent—the ports of an entire country or nation, by the adoption of an extended system of rigorous and continuous blockade. The pretense, therefore, that they have no right to complain, since they retain their accustomed trade, is evidently fallacious, and the rule that this pretext is alleged to justify, partial and unequal. The rule prohibits absolutely any extension of their accustomed trade, but provides no security for its actual enjoyment. By the operations of the war that trade is certain to be greatly abridged. In no event is it permitted to be enlarged. Hence to deny to neutrals the right of entering into the new channels of commerce that the necessities of the war may open to require them to submit to the numberless restraints and inevitable losses that the war must produce, while they are precluded from seeking an indemnity in the countervailing advantages that the war itself may offer, is to inflict upon their commerce a certain and grievous injury—an injury of such extent and magnitude that the right of a belligerent power to inflict it can only be established on the clearest evidence. The principle from which the right is made to flow must be incontestible; the deduction, necessary and inevitable. In his eloquent vindication of the existence of the right, Sir WILLIAM SCOTT is far from asserting that there can be no extension of the trade of neutrals with the enemy during a war. He is far from considering the rule that forbids such an extension, as universal, so that in every war each of the contending parties has an equal right to enforce the prohibition. The reasons that he assigns in support of the rule necessarily imply that the right depends for its existence on the peculiar character and circumstances of the war, the relative strength and power of the parties, and hence that its legitimate exercise must be confined, in all cases, to a single belligerent. I shall give the substance of his argument relative to the colonial trade, the most important branch of the inquiry, nearly in his own language. What, he inquires, is the colonial trade, generally speaking? It is a trade generally shut up to the exclusive use of the mother-country to which the colony belongs, and this for a double purpose. The one, that of supplying a market

terial and does not affect the risk; or if the insurer has not been deceived; or if it is made concerning facts which lie as much within the knowledge of the

for the consumption of native produce; the other, of furnishing to the mother-country the peculiar commodities of the colonial regions. And to these two purposes of the mother-country the general policy respecting colonies belonging to the states of Europe has restricted them. What, then, upon the interruption of a war, are the respective rights of belligerents and neutrals regarding such colonies of the enemy? It is an indubitable right of the belligerent to possess himself of such places as of any other possession of his enemy. That is his common right; but he has the certain means of carrying such a right into effect if he has a decided superiority at sea. Such colonies are dependent for their existence as colonies on foreign supplies. If they can not be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected. He can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent. and to say: 'True it is, you have, by force of arms, forced his colonies out of the exclusive possession of the enemy; but I will share the benefit of the conquest. You have, in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with which we had never presumed to interfere; but we will now interpose to prevent his absolute surrender by the means of that very opening which the prevalence of your arms alone has effected. Supplies shall be sent, and their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself. We insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.' Upon these grounds the learned judge proceeds to say: 'It can not be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will, by his necessity, that changes his system; that change is

insurer as the assured, and the party making the representation believes it to be true at the time it is made. (*d*) But, if the underwriter has been thrown

(*d*) *Driscoll v. Passmore*, 1 B. & P. 313. *Bowden v. Vaughan*, 10 East, 204. *Hubbard v. Glover*, 3 Campb. 415. *Flinn v. Headlam*, 9 B. & C. 693.

the direct and unavoidable consequence of the compulsion of war. It does not flow from the counsels of the enemy, but from the force of his adversary.' It is not to be denied that these observations are a virtual surrender of the rule as universal or general. The trade of neutrals with the colonies of the enemy is not unlawful because it is first opened to them during the war. It is only unlawful when its direct and immediate tendency is to relieve the colonies from a hostile pressure, so close and imminent that, but for the interference of neutrals, it would inevitably compel them to surrender. That such was the meaning of the learned judge is rendered, if possible, still more evident by his subsequent remarks. In the case from which his argument is extracted, the counsel for the claimants strenuously argued that variations are constantly made by the nations of Europe, when engaged in war, in their measures of commercial policy, by which neutrals are admitted to privileges from which, in time of peace, they were wholly excluded; that such variations, of which England herself has given many examples, are always a consequence of the war; they are made on account of the war, and are intended to obviate some inconvenience that the war produces; but that it had never been held that they were, on that ground, so unlawful as necessarily to involve the property of neutrals, who avail themselves of a new privilege, in the peril of confiscation. To these observations Sir WILLIAM SCOTT replied, that it is true that such variations as had been described take place in war, and arise out of a state of war, but that they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom—which, in his judgment was the true foundation of the principle. 'It is not every convenience,' he added, 'or even every necessity arising out of a state of war, that can be admitted to produce the effect of rendering the neutral's trade unlawful, but that necessity alone which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy.' The reasoning, therefore, of the learned judge leaves no doubt as to the true and sole foundation of the rule

off his guard and prevented from making those enquiries which he would otherwise have made, the assured will be precluded from suing upon the policy, although

that he enforced. It is the existence of a naval superiority, so decided as to be enabled to prevent all exports from the colonies of the enemy, and to intercept all their supplies, thus forcing the enemy to open his ports to neutrals as the only means of rescuing them from capitulation or ruin. Unless the rule can be sustained on these grounds it is, in effect, admitted that it has no legal existence. Sir WILLIAM SCOTT's opinion in the *Immanuel*, 2 Rob. pp. 200-4; Vide also his argument in the *Immanuel*, 1 Rob. 296. To the doctrine thus stated there are unanswerable objections. It derives all the plausibility with which it is invested in the argument that has been given from a series of positions that, without evidence, are assumed to be true; and from the truth of which the illegality of the trade seems to flow as a necessary conclusion. Stript of the disguise with which a most skilful phraseology has clothed it, the doctrine is an unwarranted and most dangerous extension of the right of blockade, at utter variance with the principle on which the law of blockade, as now understood and defined, is certainly founded. The law of nations, in requiring the immediate presence of an adequate force as necessary to constitute a valid blockade, evidently implies that it is only by this mode of applying its force that the ability of the blockading state to suspend entirely the commerce of the blockaded port can be manifested. This entire suspension, this temporary destruction of the commerce of the port, is the object of a blockade. An actual and complete investment is the only means by which, in judgment of law, the object can be accomplished. But the argument of Sir WILLIAM SCOTT gives to a superior naval force, consisting of a multitude of ships dispersed on the ocean, exactly the same effect in rendering unlawful the trade of neutrals with the colonial ports of the enemy, that would result from an actual blockade, a separate and effectual circumvallation of each and every one of them. The colonial trade of the enemy is suspended, is cut off—but for neutral interference (such is the argument), would be annihilated—but it is suspended, not because at the entrance of each colonial port a naval force is stationed, rendering dangerous the attempt of any vessel to enter or depart—this is not pretended—the colonial trade of the enemy in all its extent and magnitude, is suspended not by a blockade of the

the means of information may be within reach of the underwriter. (e) A fraudulent misrepresentation, made to the first underwriter in a material point affect-

(e) *Macintosh v. Marshall*, 11 M. & W. 116.

colonial ports, but by a blockade of the ocean. To such an extravagant pretension of the belligerent the reply of the neutral is conclusive: 'You require us not to rob you of the conquest for which your blood and treasure have been expended; not to intercept the fruits of your victory by conveying supplies to the colonies of the enemy that are pressed by your arms, and if unsupplied must inevitably fall into your possession. Prove to us that you have the ability to intercept the supplies that we desire to send by an actual and legal investment of the ports from which you would exclude us, and we yield to your demand. Otherwise your allegation that you possess a superior naval force, competent to effect the object, we must wholly disregard. It is a mere assertion, unsustained by the only proof that the universal law by which we are equally bound deems to be sufficient.' It has already been intimated that the reasons on which the English courts of admiralty have proceeded may, by a legitimate extension, be applied to the entire destruction of neutral commerce, and a few remarks will suffice to show that all the commerce of neutrals with the mother-country, the whole of their accustomed trade, may be prohibited exactly on the same grounds on which they are excluded from a trade with the colonies. If a court of admiralty has a right to assume that the naval superiority of its own country is so decided as to be competent to destroy effectually and absolutely all the trade of all the colonies of the enemy, no reason can be assigned why it may not assume the existence of the same power in relation to all the trade of the parent state; and if the trade of neutrals with the colonies of the enemy is unlawful, because it has an immediate tendency to rescue them from the consequence, otherwise inevitable, that the superior force of the belligerent would produce the trade with the mother-country, it must be equally unlawful where its pernicious tendency is equally immediate and equally certain. Let it not be said that neutrals have a full security against such an extension of the doctrine in the admission that they are entitled to prosecute, during the war, their accustomed trade, in all the extent of which it is capable. They have no security. Neutrals have no right to enjoy

ing the risk, is considered as a misrepresentation to every underwriter who underwrites the policy after him, because the obtaining of the signature of the

their accustomed trade in time of war where its continuance tends directly to the aid of the enemy in the prosecution of the war, or to relieve him from its immediate pressure. They have no right to retain the smallest portion of their trade with a port effectually blockaded. Hence if in relation to a single port a superior naval force on the ocean may be held to produce the same legal consequences as an actual blockade, the same legal consequences must follow in all cases where the existence and adequacy of the superior force on similar grounds are established or asserted. If the position can be true of a single port, it may be true of all; and if a court of admiralty may constitute itself the sole judge of the existence of the necessary facts in a single case it may in all. The existence and the sufficiency of a blockade are definite facts, capable of being established or refuted by positive evidence; but the existence of a naval superiority on the ocean, its competency to destroy, partially or wholly, the commerce of the enemy, and the certainty that but for neutral interference the object would be accomplished, are facts that, in applying its doctrine, the belligerent court of admiralty, upon its own authority, assumes to be true. They are not attempted to be proved, and indeed, from their very nature, are incapable of being established by legal evidence. It is enough that the presiding judge of the admiralty asserts their existence, and to the extent in which he chooses to make the assertion the commerce of neutrals is annihilated. Hence there is no possible security for neutrals except in a strict adherence to the rule that their trade, even with a single port of the enemy, can not be wholly interdicted unless by means of a legal blockade. Admit the principle on which Sir WILLIAM SCOTT founds his decisions, and there are no limits to its possible application. The commerce of the neutral, in all its extent and in all its branches, is delivered over to the mercy of the belligerent. These remarks lead naturally to the last objection that I propose to state, and which seems alone decisive. The rule of the English admiralty, as explained and vindicated, is vague and equivocal in its terms, uncertain and arbitrary in its application. It seems expressly framed to entrap the neutral merchant to his ruin. It is impossible that the merchant can know, when he meditates or begins a voyage, whether the

first underwriter weighs with the others, and induces a misplaced confidence ; but a misrepresentation to an intermediate underwriter has been held not to extend to the others. (*f*)

(*f*) *Barber v. Fletcher*, 1 Doug. *Forrester v. Pigou*, 1 M. & S. 13. Bell 306. *Sibbald v. Hill*, 2 Dow, 266. *v. Carstairs*, 2 Campb. 543.

existing state of facts will necessarily, or probably, call the rule into operation. He may always know whether the articles in which he desires to trade are held to be contraband of war by either of the belligerents. He may always ascertain whether the port to which his ship is destined is under an actual blockade. It is only by his own voluntary act, or by the gross misconduct of his agents, that his property in these cases can be exposed to confiscation from a violation of neutral duty. But how is the neutral merchant to ascertain at any given period of the war that the naval superiority of one of the belligerents is so decided as to afford the certain means of reducing into its possession all the colonies of the enemy, by preventing their exports and intercepting their supplies? How is he to ascertain that the force, however superior, is so employed and disposed as to enable it with certainty to accomplish the object? (Clearly this is a necessary part of the inquiry. If in a war between England and France, England should have a thousand ships of war, and France not one, if all the ships of England were shut up in her own ports, the colonies of France would be in no danger, or if their operations were confined in the British Channel or the Mediterranean, the colonies in the West and East Indies would be able to obtain without molestation all their necessary supplies. The observations of Sir WILLIAM SCOTT certainly imply that the superior naval force must be actively and efficiently employed. His language is, 'If the belligerent choose to apply his force to such an object (the conquest of an enemy's colonies), what right has the neutral to step in and prevent its execution?' But how is the neutral to know that the belligerent has chosen to apply, and is actually applying, his force to this object? And if the test of a blockade be abandoned, who shall define the facts that shall be considered as evidence of the proper application of the force?) How is he to ascertain that these colonies are so exclusively dependent for their existence on foreign supplies that unless supplied by neutrals they must inevitably fall into the possession

1157. *Fraudulent concealment* of circumstances materially affecting or enhancing the risk to be incurred by the insurer or underwriter avoids all poli-

of the belligerent? How is he to ascertain that the opening of the colonial trade into which he desires to enter was a direct and unavoidable consequence of the compulsion of war, and not such a variation in the commercial policy of the enemy as it is admitted that nations engaged in war have a right to adopt? And, above all, with whatever care and deliberation he may proceed, and however confident he may be in the truth of the conclusion at which he arrives, what security can he have that his own judgment will coincide with that of the tribunal by which the legality of the voyage and the fate of his property may chance to be determined? It is manifestly unreasonable and unjust to impose upon the neutral merchant the necessity of prosecuting inquiries so multiplied and intricate as these, and to make the fate of his property, perhaps his safety or ruin, depend on the issue of a deliberation so delicate, and doubtful, and complex. Hence the rule, although limited, as explained, to a peculiar state of the war, and this a state not likely to frequently occur, is, to the prudent merchant, an entire prohibition of the trade to which it relates, and to the rash and adventurous a dangerous snare. The prudent merchant will not expose his property to the indefinite perils of a rule so loose and vague in its terms and so discretionary in its application; and the adventurous, when most confident of his safety, will often find that the snare he ought to have dreaded is sprung to his destruction. If no servitude is more wretched or degrading than that of the subject or citizen, where the laws that he is required to obey are vague or unknown, it is to this species of servitude that neutrals are doomed in every future war in which England shall be a party if the pretensions of her government and the authority of the rule on which her tribunals have acted are to be admitted as adopted and incorporated into the law of nations. As it is by no means probable that the rule of 1793 will be revived in future wars, not only from its own doubtful character and the resistance that the attempt to enforce it will be certain to provoke, but from the great changes that have since been made in the colonial system of the powers of Europe, it will be unnecessary to examine in detail the various decisions in which it was enforced; it will be sufficient to state in a few words their substance and result. In respect

cies of assurance, and prevents the insured from recovering in respect of a loss wholly unconnected with the circumstance concealed. (*g*) The keeping back of

(*g*) *Seaman v. Fonerau*, 3 Str. 1183. *Traill v. Baring*, 33 L. J., Ch. 521.
Fitzherbert v. Mather, 1 T. R. 12. *Proudfoot v. Montefiore*, L. R., 2 Q.
Hodgson v. Richardson, 1 W. Bl. 463. B. 511; 36 L. J., Q. B. 225.

to the coasting trade of the enemy, the rule, as enforced in the English admiralty, seems to have been substantially the same with that of 1756. There is no case in which the penalty has been extended beyond a forfeiture of the freight, unless where the true destination of the ship was sought to be concealed by false papers. In such cases the fraud involves the ship in the general condemnation. *The Emanuel*, 1 Rob. 296; *The Phoenix*, 3 Id. 186; *The Tholen*, 6 Id. 72. The rule in its application to the colonial trade underwent, during the war, several modifications. In 1793 the British government issued instructions to its public and private ships of war "to detain and bring in for adjudication all neutral vessels laden with the produce of any colony of France, or carrying provisions or other supplies for the use of any such colony." In 1794 these instructions were modified so as to authorize only "the capture of the vessels with cargoes, the produce of a French West-India Island, on a direct voyage from the colonial port of lading to a port in Europe," thus leaving open and unrestricted the direct trade between the French West Indies and the United States, and from the latter in vessels with colonial produce to any other part of the world. In 1798 the instructions were still further extended, so as to permit to neutrals a direct trade between the colonies of the enemy and a port of Great Britain, or any port of a country in Europe to which the neutral ship might belong. All the subsequent alterations, however, although of necessity obeyed by the courts of admiralty, were considered by them as a mere relaxation of the general rule, which, as an admitted principle in the law of nations, they held to be truly declared, not introduced or established by the original instructions. Hence although the instructions were silent as to the penalty, that of a confiscation was without hesitation adopted. (In the earlier cases the ship was restored, and the penalty limited to the forfeiture of her freight on the goods condemned. *The Rebecca*, 2 Rob. 101; *The Immanuel*, 2 Id. 206; *The Rose*, Ibid.; *The Minerva*, 3 Id. 232; but the Lords of Appeals, in the *Jonge Thomas*, 3 Id. 233, note; *The Wilhelmina*, 4

any such circumstance avoids the policy, although the suppression may have occurred through mistake, " because the underwriter is deceived, and the risk run is

Id. Append. 4; *The Nancy*, Ibid. 12, note; and other cases held, that the illegality attached as strongly on the ship as the cargo, and was a just cause of her condemnation. Why it was deemed necessary to make the penalty more severe in the colonial than in the coasting trade it is not easy to understand.) And although the first orders of the government were not issued until November, 1793, neutral ships that had previously commenced their voyages were held to be just as liable to capture, and subject to the same penalty, as those which had sailed with a knowledge of the prohibition and of their danger. *The Charlotte*, *The Jerusha*, and *the Betsey*, 4 Id. Append. 111-4. It is an obvious remark, that will not escape the attention of the reader, that the subsequent relaxations by the British government of the rule as originally declared were, in fact, an abandonment of its principle, since, by the permission of a direct trade between the neutral country and the colonies, the introduction of such supplies as might be necessary to enable the latter to resist the arms of the belligerent was rendered just as certain as it would have been by the allowance of a similar trade between the colonies and the mother-country. Although the relaxation diminished greatly the severity of the rule in its operation on the trade of neutrals, yet it renders it, as enforced, capricious and arbitrary, by depriving it of the support of all the arguments by which, in its original form, it was sought to be vindicated. (This observation, in substance, is made by the counsel for the claimant in *The Wilhelmina*, 4 Id. Append. 5, and meets with no reply from the opposite counsel, or from the court.) As an absolute prohibition, the rule had, at least, a pretext of justice; as relaxed, even the pretext was abandoned. The doctrine permitting this importation of the produce of an enemy's colony into a neutral county, and its exportation thence, soon gave rise to a new, and, in many cases, a difficult, inquiry: whether the importation into the neutral country had been made in good faith for the purpose of adding the goods to the common stock of the country, or was merely colorable, and intended to conceal an original design of exportation. Where the object of the importer was not to sell or otherwise dispose of the goods in the neutral market, but to transport them to a foreign port to which they could not have been directly

really different from the risk understood and intended to be run at the time of the agreement." (*h*) A person proposing a marine insurance is bound to com-

(*h*) *Carter v. Boehm*, 3 Burr. 1910. *Bates v. Hewitt*, L. R., 2 Q. B. 595.

taken, it was contended, and was finally decided, that the voyage of exportation was not to be considered as a new and distinct voyage, but was a mere continuance of the original voyage in which the goods had been imported, and consequently that the entire, although circuitous, voyage was just as illegal as if the neutral port had been wholly omitted. It was a direct and continuous voyage from the colonial port to the port of ultimate destination. The first case in which the question arose was that of an American vessel on a voyage from a port in Massachusetts to Spain with a cargo consisting partly of the produce of a Spanish colony. The evidence was that these goods had been imported from Havana in the same vessel, and on account of the same owners; that they had been landed in the United States during a short time while the ship was under repairs, and that the duties on them had been paid to the American government. The counsel for the captors strenuously insisted that these facts were by no means sufficient to break the continuity of the voyage, and that the prohibition of the direct trade between the colony and the mother-country would be nugatory if the voyage could be legalized by the mere transshipment of the goods in the United States. But to this argument Sir WILLIAM SCOTT replied that an American had an undoubted right to import the product of the Spanish colonies for his own use into his own country, and after he had imported it in good faith, was at liberty to carry it on to the general commerce of Europe; that although it had been contended that the landing of the goods and the payment of the duties were not sufficient evidence of an importation in good faith, he was at a loss to know, if these criteria were not to be resorted to, what other test could have been adopted? He would not say what should be universally the test of a *bonâ fide* importation, but was strongly disposed to hold that the facts relied on were sufficient, and he accordingly decreed the restoration of the vessel and the cargo. *The Polly*, 2 Rob. 361. The merchants of the United States relied on this decision as establishing the rule that the landing of the goods, and the payment of the duties, would be regarded in all cases as conclusive evidence

municate every fact within his knowledge that is material, though, if a particular fact be known to the underwriter at the time, he can not afterwards set up

that the continuity of the voyage had been broken, so as to legalize a subsequent exportation; yet it must be confessed that the influence was broader than the language of the judge seems to have warranted. Confident, however, of their safety, they engaged largely in trade with the colonies of France and Spain, with a view to the re-shipment to European ports of the colonial produce. But when this trade had existed for some years without interruption, they were suddenly awakened from their dream of security. The Lords of Appeals discovered that the tests which it was supposed that Sir WILLIAM SCOTT had held to be universally conclusive might be, and in many instances were, fallacious; and the seizure and condemnation of a vast number of American ships and cargoes were the fruits of this discovery. (The *Polly* was decided in 1800; and the first case in which it was held by the court of appeals that the landing of the produce and payment of the duties were not alone decisive of the legality of the voyage, seems to have been that of *The Essex*, decided in September, 1805 (5 Rob. 369). It was in consequence of this decision that so large a number of American ships were seized, and their seizure led to the general complaints of the merchants and the remonstrance of the American government. The validity of the rule of 1756 seems then for the first time to have been examined.) The principles of these decisions were that the original intention of the importer to tranship and import the colonial produce was the proper and sole test of the continuity of the voyage, and that his intention was to be collected from all the attending circumstances; that among these the landing of the goods and payment of duties were of some value, but, like other facts, they might be purely colorable, designed to give a false appearance of an importation where none was intended. In one of the cases in which, on the ground of the continuity of the voyage, the vessel and the cargo were condemned, it appeared that the duties had been paid and the goods landed in the United States; but it was certain from the evidence that they were not imported to be added to the common stock of the country, but with a sole view to their re-shipment and exportation. Sir WILLIAM GRANT, who delivered in this case the judgment of the Lords of Appeal, vindicated their decision substantially on the grounds

as a defense to an action on the policy, that that fact was not communicated, but, if a material fact be not communicated which, though known that follow: The act of shipping the cargo, he observed, from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? So where the party has a motive for desiring to make the voyage to begin at some other place than that of the original lading, and therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board—would this contrivance at all alter the truth of the fact? The truth may not always be discernible, but when discovered it is the truth, and not the fiction, that determines the character of the transaction. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended, nor with what trouble and expense those acts may have been attended. Where the evasive purpose is admitted or proved, a court can never be bound to accept as a substitute for the observance of the law the means, however operose, that were employed to cover its breach. Between the actual importation, by which a voyage is really ended, and the colorable, which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same, but there is this difference between them. The landing of the cargo, the entry at the custom-house, and the payment of the duties, are necessary ingredients in a genuine importation; but in a fictitious, they are mere voluntary ceremonies, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose except with a view of giving to that voyage, which he had resolved to continue, the appearance of being broken by an importation, which he had resolved not really to make. *The William*, 5 Rob. 295-6; vide also *The Maria*, 5 Id. 365. It is inti

to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defense to the underwriter.

mated by a high authority (1 Kent's Comment. 5th ed., p. 85, note) that if the doctrine that forbids a direct trade by neutrals between the mother-country and the colonies of the enemy is admitted as true, the propriety of the English decisions relative to the continuity of the voyage can not reasonably be questioned, and I fully admit that, upon this supposition, the conclusive force of the reasoning on which these decisions were founded is not to be denied. Yet it is certain that the change of the rule that, on very reasonable grounds, Sir WILLIAM SCOTT was believed to have established, and which for some years was undisturbed, operated as a surprise on the American merchants; and hence their complaints, and the remonstrance of their government, that a change, so important and disastrous in its consequences, had been made, without notice or warning, were not unreasonable. (Sir WILLIAM GRANT, in *The William*, attempts to show that the American merchants had warning, from the intimation of the court, in cases previous to *The Essex*, that the rule laid down in *The Polly* would not be literally followed. But until the *Essex*, no condemnation had been pronounced, in any case where the goods had been landed and the duties paid; and of the mere opinion of the court the American merchants were necessarily ignorant. That they were, in fact, surprised Sir WILLIAM GRANT does not deny.) The property which, under these circumstances, the courts of admiralty may have felt it their duty to condemn, the government of a great and magnanimous nation should have hastened to restore. (The reader who is desirous to peruse the investigation as to the legality of the rule of 1756, may consult, on the one side, in addition to the decisions in the admiralty reports which have been cited, and to which the following may be added: *The Welvaart*, 1 Rob. 122; *The Providentia*, 2 Id. 142; *The Calypso*, 2 Id. 154; *The Rosalie and Betty*, 2 Id. 343; 4 Id. Ap. A.; *The Juliana*, 4 Id. 328; *The Anna Catharina*, 4 Id. 107; 6 Id. note, p. 74; note, p. 252; App., notes 2 & 3; *The Thomyris*, 1 Ed. 17; *The Convenientia*, 4 Id. 201; Lord Liverpool's "Discourses on the Conduct of the Government of Great Britain," &c., Ward "On the Rights and Duties of Belligerents and Neutrals," and Mr. Stephens' celebrated pamphlet entitled "War in Disguise," and, on the American side

and it is not enough for the assured to show that the particulars supplied by him, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. (i) In the case of a time policy, if the assured willfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance will be void on the ground of the concealment of a mate-

(i) *Bates v. Hewitt*, L. R., 2 Q. B. 595.

Mr. Madison's "Examination of the British Doctrine," &c., and the memorials of the merchants of Baltimore, New York, Boston and Salem (American State Papers, vol. 5, pp. 330, 355, 367, 379.) The memorial of the merchants of Baltimore, which was drawn by Mr. Pinkney, is a masterly production. "A warranty that the property is of a country then known to be at peace is a warranty that the property is neutral by ownership, and is protected from belligerent risk by the usual documents and precautions." 2 Parsons on C., 398. A policy is not avoided if the war is declared subsequent to the making of it. *Saloucci v. Johnson*, Park. Ins. 449. The warranty of neutrality of goods extends only to the interest insured. *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274. Property held by a neutral in trust for a belligerent is belligerent property; *Murray v. United States*, 2 Johns. Cas. 168 and if goods are shipped by a belligerent to a neutral, the belligerent retaining the control of them, and the neutral not having ordered them, the goods are belligerent. *The Francis*, 8 Cranch, 359; *The Francis*, 1 Gallis. 445. But the mere right of a belligerent seller to stop the goods in transitu does not make the goods belligerent. *The Merrimac*, 8 Cranch, 317. If a warranty be lawful when made, but afterwards becomes illegal, a subsequent breach does not discharge the insurers, 2 Parsons on C. 377. Other express warranties than those named above may be made, and if made must be strictly construed. See *Duncan v. Sun Ins. Co.*, 6 Wend. 408; *Sawyer v. Coaster's Ins. Co.*, 6 Gray, 221; *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *Atherton v. Brown*, 14 Mass. 152; *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 127; *Martin v. Fishing Ins. Co.*, 20 Pick. 389.

rial circumstance. (*k*) If the assured has received a doubtful account of the loss of his ship, such as "that a ship similar to his has been captured," and neglects to disclose the intelligence to the underwriter, the policy will be void; (*l*) and so it will if the assured keeps back any fact which, if disclosed, would in all probability have caused the underwriter to charge a higher premium; (*m*) such as that the captain's judgment in the navigation of the vessel has been fettered and restricted by some unusual private instructions, (*n*) or that the ship is a missing ship out of her time, (*o*) or that she had encountered tempestuous weather, and that another ship that sailed long before her had arrived, (*p*) or that she had taken the ground, or struck on a rock, at an antecedent period, and had not been since surveyed or repaired, (*q*) or that she had been met at sea in a leaky state, (*r*) or had missed joining convoy, and been driven out to sea, (*s*) or that hostile privateers had been seen in pursuit of her, (*t*) or that, she was intended to be employed in a foreign smuggling transaction, or to carry simulated papers. But the assured, or the party effecting the policy, is not bound to disclose "loose rumors gathered together no one knows how," (*u*) nor matters which lie as much within the knowledge of the underwriter as of the

(*k*) PARKE, B., *Gibson v. Small*, 4 H. L. C. 408.

(*l*) *Da Costa v. Scandret*, 2 P. Wms. 169.

(*m*) *Wiles v. Glover*, 1 B. & P., N. R. 16.

(*n*) *Middlewood v. Blakes*, 7 T. R. 162.

(*o*) *M'Andrew v. Bell*, 1 Esp. 373.

(*p*) *Kirby v. Smith*, 1 B. & Ald. 672. *Elton v. Larkins*, 8 Bing. 198. *Bridges v. Hunter*, 1 M. & S. 20.

(*q*) *Gladstone v. King*, 1 M. & S. 35. *Russell v. Thornton*, 4 H. & N. 788; 6 H. & N. 140; 30 L. J., Ex. 69. *Holland v. Russell*, 4 B. & S. 14; 32 L. J., Q. B. 297.

(*r*) *Lynch v. Hamilton*, 3 Taunt. 37. *Lynch v. Dunsford*, 14 East, 494.

(*s*) *Sawtell v. Loudon*, 5 Taunt. 359.

(*t*) *Beckwaite v. Nalgrove*, cited 3 Taunt. 41.

(*u*) *Durrell v. Bederley*, HOLT, N. P. 285.

party effecting the insurance, nor such things as it is the business of the underwriter to know or find out for himself, such as the ordinary risks attendant upon particular speculations or adventures, the usages of trade, the dangers of particular seas and rivers, the probability of hostilities between different foreign states, nor the build, age, history, or capabilities of the ship, although, if questions are put to him upon any of these points, he is bound to answer to the best of his information and belief, and, if he knowingly states that which is false, he is guilty of a fraudulent misrepresentation which avoids the policy. (x) The insured is not bound to disclose to the underwriter the time of the ship's sailing, or to say whether she has sailed or not, unless the ship is a missing ship. If the underwriter wants to know, he ought to inquire." (y) If the insured, at the time he effects the insurance, knows that the loss insured against has taken place, this is obviously a downright fraud, which avoids the policy ; but, if he does not know of the loss, the validity of the insurance will depend upon the terms of the particular policy. If the insurance is on goods alleged to be on board a particular vessel, and no such goods or vessel exist at the time the policy is effected, the contract is nugatory, and the risk upon it never attaches. But, if the policy is on goods "lost or not lost," the indemnity extends, as we have before seen, to all past as well as future losses. An agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship or cargo, ought to do so by electric telegraph where that means of communication is in general use ; and, if the

(x) *Carter v. Boehm*, 3 Burr. 1915. *Harrower v. Hutchinson*, L. R., 5 Q Haywood v. Rodgers, 4 East, 597. B. 584.
Freeland v. Glover, 7 East, 464. (y) *Fort v. Lee*, 3 Taunt. 381.

agent omits to discharge this duty, and the principal being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance the insurance is void on the ground of concealment.

(z) And, although the party making the representation be innocent, yet, if he build his information on that of his agent, and the agent be guilty of a misrepresentation, the principal must suffer. (a) But, when the slip has been initialed, the assured need not communicate to the underwriters facts which come to his knowledge afterwards, but before the policy is completed. (b)

1158. *Of the risks covered by the policy—Custom and usage.*—Everything done in the usual course of navigation and trade is presumed to have been foreseen and in contemplation by the parties to every contract of insurance at the time they entered into the engagement. Therefore, where a vessel engaged in the China trade was heeled down in an estuary, to be cleaned and re-fitted for the return voyage to England, and the tackle was put on a sandbank and there accidentally burnt, and it was shown to be customary for vessels in that trade, and engaged in that particular navigation, to re-fit and prepare for the home voyage in the same manner, it was held that the insurer was bound to make good the loss. (c) If the policy is effected on the ship, tackle, boats, and furniture, and it is the custom to sling boats over the quarter outside the ship, the underwriter will be responsible for a boat lost by being so slung; for every under-

(z) Proudfoot v. Montefiore, L. R., 304; 41 L. J., Q. B. 195, n. Lishman v. The Northern Maritime Insurance Co., L. R., 8 C. P. 216; 42 L. J., C. P. 108.

(a) Fitzherbert v. Mather, 1 T. R. 12 16. Gladstone v. King, 1 M. & S. 108.

(c) Pelly v. Royal Ex. Ass. Co., 1 Burr. 341.

(b) Cory v. Patton, L. R., 7 Q. B.

writer is presumed to be acquainted with the practice of the trade he insures, and, "if he does not know, he ought to inform himself." (*d*) If liberty of "unloading and re-shipping" is expressly given by the policy, that must be taken to mean an unloading and re-shipping according to the usage of the trade; and, therefore, if it is the custom to put goods on board a store-ship to await the arrival of a vessel into which they can be re-shipped, and the goods are lost in such store-ship, the underwriters will be responsible. (*e*) If it is the custom, for vessels insured "to depart with convoy," to sail from the loading port without convoy to the general place of rendezvous for ships wanting convoy, and a vessel is captured whilst proceeding thither unaccompanied, to obtain convoy in the customary mode, the underwriters will be responsible for the loss. (*f*)

1159. *Deck cargoes.*—If it is the known custom of the captains and masters in any particular trade to carry deck cargoes, and such a cargo is insured and washed overboard, the underwriter will be bound to make good the loss; but, as goods thus carried are exposed to greater hazard than goods carried in the ordinary way, they will be discharged from liability, unless the custom is clearly established, or the underwriters have express notice of the increased risk. (*g*) By the 16 & 17 Vict. c. 107, s. 172, deck cargoes are prohibited at certain periods of the year in vessels sailing from British ports in North America. A policy of insurance, therefore, entered into for the express

(*d*) *Blackett v. Royal Ex. Ass. Co.*, 2 C. & J. 249. *Noble v. Kennoway*, 2 Doug. 513.

(*e*) *Tiernay v. Etherington*, cited 1 Burr. 346.

(*f*) *Gordon v. Morley*, 2 Str. 1265; *Warwick v. Scott*, 4 Campb. 62.

(*g*) *Milward v. Hibbert*, 3 Q. B. 120. *Miller v. Titherington*, 30 L. J., Ex 217; 31 L. J., Ex. 363; 6 H. & N 278; 7 H. & N. 954.

purpose of protecting what the law has prohibited will be invalid; (*h*) but the statute does not make the voyage absolutely illegal, so as to affect innocent persons. It must be shown that the policy was effected with full knowledge by the insured that the goods were to be placed on deck, and that the vessel was to sail during the prohibited period; and the knowledge of the ship-master is not the knowledge of the ship-owner. (*i*) A custom that underwriters are not liable under the ordinary form of policy for general average in respect of the jettison of goods stowed on deck is a valid custom, and does not contradict the terms of the policy. (*k*)¹

1160. *Intermediate voyages—Custom and usage.*—On fishing-voyages to the American seas, it is customary for vessels, after the termination of the outward voyage, to be employed in banking or fishing off the coasts of Newfoundland before they return; and, if a vessel is insured for the outward and homeward voyage, the insurance will cover and protect the vessel during the intervening period occupied by fishing, if she is not detained longer than is customary and usual. (*l*) If it is the custom, when several empty vessels arrive together at the port of lading and can not all find cargoes, to employ some of them on a short intermediate voyage, and a vessel insured for

(*h*) *Cunard v. Hyde*, 29 L. J., Q. B. 87; L. R., 1 Q. B. 162.

6; 2 El. & El. 1.

(*k*) *Miller v. Tetherington*, 7 H. &

(*i*) *Cunard v. Hyde*, 27 L. J., Q. B. N. 954; 31 L. J., Ex. 363.

408. *Wilson v. Rankin*, 34 L. J., Q. B. 66; 6 B. & S. 208; 35 L. J., Q. B. 503.

(*l*) *Vallance v. Dewar*, 1 Campb

¹ See as to deck cargoes, *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429; *Adams v. Warren Ins. Co.*, 22 Id. 163; *Taunton Copper Co. v. Merchants' Ins. Co.*, Id. 108. But an exceptional usage may; if known and established, affect the policy upon this point; See *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603.

the outward and homeward voyage is so employed, and then takes on board her return cargo, and is lost on the homeward voyage, the liability of the underwriters in respect of the loss will not be discharged ; but a usage for the employment of the vessel for an unreasonable or unnecessary space of time will not be sanctioned. (*m*) Where a ship was insured "at and from Bengal to any ports or places whatsoever beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival at London," and it was proved to be the notorious usage of the East India trade to detain vessels in the Indian seas for a reasonable period, extending to several months, for the purpose of employing them on intermediate country voyages in those seas before they make the return voyage to Europe, it was held that the underwriters must be deemed to have contracted with reference to the known usage, and that the customary intermediate voyage was covered and protected by the policy. (*n*) The usages established amongst the underwriters at Lloyd's can not affect their liability upon the policy, unless it be shown that the assured was cognizant of them, or was in the habit of transacting business at Lloyd's. (*o*)

1161. *Loss by perils of the sea—Negligence and misconduct of the master or mariners.*—The risks that the underwriters generally take upon themselves by the common form of policy are perils of the sea, fire, pirates, letters of mart and counter-mart, takings at sea, restraint of princes and people, barratry of the masters and mariners, &c. We have already seen that as between the carrier of goods by sea and the owner

(*m*) *Ougier v. Jennings*, 1 Campb. 505, n. (*a*). *Phillips v. Irving*, 8 Sc. N. R. 7.

(*n*) *Salvador v. Hopkins*, 3 Burr. 1707.

(*o*) *Scott v. Irving*, 1 B. & Ad. 605.

of such goods, losses which, though caused immediately by the violence of the winds and waves, are imputable to the ignorance or negligence of the master or mariners, are not losses by perils of the sea ;¹ but a different rule prevails in cases of insurance where the immediate and not the remote cause of loss is regarded, so that if a vessel is stranded and wrecked through the incompetency or misconduct or barratry of the captain and crew, the loss is nevertheless, as between the insurer and insured, a loss by perils of the sea, and is covered by the policy, provided the assured, if the insurance is on the vessel itself, had appointed a sufficient crew, and a captain who appeared to have competent skill at the commencement of the voyage. (*p*) If, by reason of the willful extinguishment of a particular light by a hostile force, the captain miscalculates his position, and the ship goes ashore, the loss is a loss by perils of the sea, although it might never have occurred if hostilities had not broken out. (*q*) And, if a ship is wrecked on a foreign coast, and the cargo gets into the hands of the authorities there, and the owners, in order to recover it, are compelled to pay a sum of money to such authorities, the loss of that sum, being an immediate consequence of the wreck, is a loss by perils of the sea. (*r*) A loss occasioned by another vessel's running down the ship insured is a loss by perils of the sea, although there has been negligence and want of skill on the part of the master and crew of the ship insured. (*s*) If, in the collision, both vessels are injured, and the owners are

(*p*) *Redman v. Wilson*, 14 M. & W. P. 170.
483.

(*r*) *Dent v. Smith*, L. R., 4 Q. B.

(*q*) *Ionides v. Univ. Marine Ass.* 414 ; 38 L. J., Q. B. 144.

Co., 14 C. B., N. S., 259 32 L. J., C (*s*) *Smith v. Scott*, 4 Taunt. 126.

¹ See *ante*, vol. ii.

compelled by the rules of the Court of Admiralty to divide the loss, and the ship insured has done more damage than she has received, and the owners are obliged to pay the balance, this is not then a loss by perils of the sea, as the sea is not the proximate cause thereof: "it grows out of an arbitrary provision in the law of nations from views of general expediency, and can no more be charged upon the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against." (t) If a ship takes the ground on entering or leaving port, the loss is, as we have before seen, a loss by perils of the sea; but, if she is hove down on a beach within the tideway, or placed in a graving dock, to be repaired or cleaned, and rolls over or is blown over by the wind, and is bilged or damaged, the loss is not a loss from perils of the sea; for the sea is not in such a case the proximate cause of the mischief. (u)

1162. The collision clause now frequently inserted in policies to secure the shipowner against damage, which he may be compelled to pay for injury done to others by his vessel coming into collision with another, does not extend to damages paid by the assured in respect of loss of life or personal injury. (x) Nor does it cover the extra costs which the assured may be put to when he is sued for damages for a collision, but gets a verdict. (y)

1163. *Sea risks covered by the policy.*—Loss or damage resulting from ordinary wear and tear, or

(t) *De Vaux v. Salvador*, 4 Ad. & E. 420. nand, L. R., 4 C. P. 117.

(x) *Taylor v. Dewar*, 5 B. & S. 58;

(u) *Thompson v. Whitmore*, 33 L. J., Q. B. 141.

Taunt. 227. *Phillips v. Barber*, 5 B. (y) *Xenos v. Fox*, L. R., 4 C P & Ald. 161. See *Davidson v. Bur-* 665.

from some inherent vice or defect, (*z*) is not covered by the policy. There must be something fortuitous or accidental in the nature of the damage. (*a*)¹ Therefore, where a vessel moored in a river waiting her turn to discharge her cargo, floated when the tide was in, and took the ground when the tide was out, and so remained for several days, when she became hogged or strained, and the cabin doors would not shut, and she was obliged to go into dock to be thoroughly repaired, it was held that there was nothing in the disaster which could be referred to the perils insured against. The tide rose and fell as the tide always does; there was no *casus fortuitus*; and the underwriters were not answerable. (*b*)² If a vessel founders at sea in consequence of her hull having been eaten into by worms during the voyage, the loss is a loss by perils of the sea, as the sea is the proximate cause of the mischief. But, if the vessel gets safe to some intermediate port at which she was authorized to touch, and is then unable to put to sea again in consequence

(*z*) BYLES, J., *Koebel v. Saunders*, 336; 30 L. J., Q. B. 354.
 17 C. B., N. S., 79; 33 L. J., C. P. (*b*) *Magnus v. Buttemer*, 11 C. B.
 312. 876; 21 L. J., C. P. 119. *Corcoran v.*
 (*a*) *Paterson v. Harris*, 1 B. & S. Gurney, 1 Ell. & Bl. 456.

¹ *Barnewell v. Church*, 1 Caines, 234; *Coles v. Insurance Co.*, 3 Wash. C. C. 159.

² "It is another rule, that insurers are not liable for property destroyed by the effect of its own inherent deficiencies or tendencies (2 *Parsons on C.* 375), "unless these tendencies are made active and destructive by a peril insured against. So with the cargo; if hemp, which was dry when laden, be afterwards wet by a peril of the sea, and by reason of such wet ferments, or rots, or burns, the insurers would be liable, not only for the hemp (*Id.*), but for the ship or cargo, if destroyed by the burning hemp." Nor are insurers liable for ordinary leakage or breakage (*Id.*), or for wear and tear. *Fisk v. Commercial Ins. Co.*, 18 La. 177; *Coles v. Marine Ins Co.*, 3 Wash. C. C. 159.

of the ravages made in her hull by the worms, or in consequence of her bottom having been eaten into by rats whilst she was lying in port, the loss is not a loss from perils of the sea, but a loss from the ravages of worms and rats, as the worms and the rats are then the proximate, and not the remote, cause of the mischief. (c)¹

1164. *Losses from old age and decay and other causes, not being perils of the sea.*—If a vessel is old, and her timbers decay during the voyage, and the bolts and fastenings become loosened, and she founders in a gale of wind which a younger and stouter vessel would in all probability have ridden out in safety, the loss is a loss by perils of the sea; (d) but, if she gets safe into port, and there drops to pieces, or is found to be unfit to go to sea again from age and decay, the loss is not a loss from perils of the sea, but from old age.

Where a policy was effected on merchandise laden on board a vessel, and the ship was disabled in a storm and obliged to put into port to re-fit, and the master,

(c) *Hunter v. Potts*, 4 Campb. 204.

(d) *Phillips v. Nairne*, 4 C. B. 358.

¹ See *ante*, vol. ii, note 1, p. 672. In the United States the perils insured against in marine policies are usually "perils of the sea, fire, barratry, theft, robbery, piracy, capture, arrests, and detention." 2 Parsons on C. 374. The loss must be without the collusion or contribution of the insured or the master and crew who are his agents. *Goix v. Knox*, 1 Id. 337; *Skidmore v. Desdoity*, 2 Id. 77; *Chandler v. Worcester Ins. Co.*, 3 Cush. 328; *Vos v. United Ins. Co.*, 2 Johns. Cas. 187; *Andrews v. Essex Ins. Co.*, 3 Mason, 6. But if a peril insured against is the direct cause of the loss, the negligence or ignorance of the master and crew will not avoid the policy. 2 Parsons on C. 374. But the cases are conflicting. Consult *Waters v. Merchants' Ins. Co.*, 11 Pet. 213; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 276; *Nelson v. Suffolk Ins. Co.*, 8 Cush. 496; *Perrin v. Protection Ins. Co.*, 11 Ohio, 147.

in order to defray the expense, sold part of the goods, and applied the proceeds in payment of such expense, it was held that, as it was a want of funds aliunde which obliged the captain to have recourse to a sale of the goods, the loss was not a loss from a peril of the sea. (*e*) Where a vessel went ashore and was wrecked in consequence of two of the crew being seized and carried off by a pressgang whilst they were making fast a line to the quay, it was held that, as the immediate cause of the loss was the stranding of the vessel, it was a loss by perils of the sea within the meaning of the policy of insurance, although it had been brought about and occasioned by the pressgang. (*f*) If a cargo of living animals is insured "free from mortality and jettison," and the beasts are killed by the rolling of the ship in a storm, the underwriter is nevertheless liable, as the exception extends only to death from natural causes, and the death in such a case arises immediately from a peril of the sea. (*g*) If a cargo of hides has been insured, and the upper portion of the cargo has been injured from putrefying exhalations arising from the decomposition of the lower hides occasioned by the action of sea water, the injury to the upper hides is a loss occasioned by perils of the sea; and, if the cargo consists partly of corn or tobacco and partly of hides, and the sea water renders the hides putrid and the putridity of the hides injures the corn or the tobacco, such injury constitutes a loss by perils of the sea. (*h*) But if a cargo of hemp or cotton is put on board in a damp and dangerous state, and it ferments

(*e*) *Powell v. Gudgeon*, 5 M. & S. 437. *Sarquy v. Hobson*, 2 B. & C. 7. In such a case the owner of the goods must resort to the shipowner for an indemnity against the loss. *Ante*.

(*f*) *Hodgson v. Malcolm*, 5 B. & P. 336.

(*g*) *Lawrence v. Aberdein*, 5 B. & Ald. 107.

(*h*) *Montoya v. Lond. Ass. Co.*, 6 Exch. 451.

and catches fire or becomes damaged, this is not a loss by perils of the sea, but from an inherent defect in the article itself; (*i*)¹ nor is it a loss by perils of the sea where goods are spoiled by reason of mere delay occasioned by stormy weather. (*k*) A loss from capture or robbery by pirates is a loss by "perils of the sea." (*l*) If a ship is captured and taken in tow by a man-of-war, and is thereby exposed to a tempestuous sea which injures goods on board, the loss may be treated either as a loss by perils of the sea or a loss by capture. (*m*)² If a vessel has sailed out of port on her intended voyage, and does not arrive at her port of destination within a reasonable period, and no intelligence can be obtained respecting her, this is evidence of the loss of the vessel from perils of the sea. (*n*)³

1165. *Perils of fire and jettison.*—When fire is one of the perils insured against, "and the ship is lost by fire, it is of no consequence whether this was occasioned by a common accident, or by lightning, or by

- | | |
|--|--|
| (<i>i</i>) Boyd v. Dubois, 3 Campb. 132. | (<i>l</i>) 2 Roll. Abr. 248, fol. 10. |
| BYLES, J., Koebel v. Saunders, 17 C. B., N. S., 79; 33 L. J., C. P. 312. | (<i>m</i>) Hagedorn v. Whitmore, 1 Stark. 157. |
| (<i>k</i>) Taylor v. Dunbar, L. R., 4 C. P. 206. | (<i>n</i>) Green v. Brown, 2 Str. 1199.
Koster v. Reed, 6 B. & C. 19. |

¹ See *ante*, note 2, p. 892.

² "Capture" is distinguished from "arrest," the former meaning a seizure without intention of returning, the latter a mere detention. See Black v. Marine Ins. Co., 11 Johns. 287; Levy v. Merrill, 4 Greenl. 180; Lee v. Boardman, 3 Mass. 238; Rhinelander v. Ins. Co. of Penn., 4 Cranch, 29; Olivera v. Union Ins. Co., 3 Wheat. 183; Odlin v. Ins. Co. of Penn., 2 Wash. C. C. 312; Ogden v. N. Y. Ins. Co., 11 Johns. 177. An embargo or blockade would be an "arrest," and not a "capture." Munford v. Phoenix Ins. Co., 7 Johns. 449; Olivera v. Union Ins. Co., 3 Wheat. 183; Wilson v. United Ins. Co., 14 Johns. 227; Richardson v. Marine Ins. Co., 6 Mass. 102.

³ Gordon v. Bowne, 2 Johns. 150; Brown v. Neilson, 1 Caines 525; Patterson v. Black, 2 Marsh. Ins. 781.

an act done in duty to the state," to prevent the vessel from falling into the hands of the enemy, (*o*) or by the gross negligence of the captain or crew. (*p*) "Fire is still the *causa causans*, and the loss is covered by the policy." Where a vessel insured against fire was described in the policy as "lying in the Victoria Dock with liberty to go into a dry dock," it was held that the ship was not covered by the policy whilst she was lying in the Thames not in transitu to the dry dock. (*q*) When jettison is one of the risks insured against, the policy will cover a loss occasioned by the throwing of the goods overboard to prevent their falling into the hands of the enemy. (*r*)

1166. *Loss by capture and seizure.*—When an insurance was effected against capture only, and the vessel was driven on the enemies' coast in a stiff gale of wind, but received no damage, and, whilst she remained stranded on the shore, she was seized and confiscated, it was held that this was a loss by capture. (*s*)¹ But if the vessel had been disabled or totally wrecked, it would have been a loss from perils of the sea. (*t*) The circumstance that the capture has been occasioned by the barratry of the master, or that it is an illegal capture, does not render the capture less a capture. (*u*) As insurances on voyages to ports blockaded by a British squadron are illegal, no action can be maintained for indemnity in respect of losses resulting from

(*o*) *Gordon v. Rimmington*, 1 Campb. 398.
123.

(*p*) *Busk v. Royal Ex. Ass. Co.*, 2 B. & Ald. 73.

(*q*) *Pearson v. Commercial Un. Ass. Co.*, 33 L. J., C. P. 85; 15 C. B., N. S., 304; L. R., 8 C. P. (Ex. Ch.) 548; 42 L. J., C. P. (Ex. Ch.) 548.

(*r*) *Butler v. Wildman*, 3 B. & Ald.

(*s*) *Green v. Elmslie, Peake*, 278.

(*t*) *Hahn v. Corbett*, 2 Bing. 205.
Ionides v. Universal Marine Association, *ante*.

(*u*) *Arcangelo v. Thompson*, Campb. 621. *Powell v. Hyde*, 5 Ell & Bl. 611. *Palmer v. Naylor*, 10 Exch. 382; 23 L. J., Ex. 323.

¹ See *ante*

an attempt to break such a blockade, if it appears that the party bringing the action knew of the blockade and attempted to break it at the time he effected the insurance. If he had no knowledge of the blockade or no intention to break it, or had fair ground to think that the blockade would be raised by the time the vessel reached her destination, the insurance will be valid.

(*x*) Insurances by British subjects of foreign vessels and cargoes from captures do not extend to captures made by order of the government of this country; for all insurances of enemies' property against British capture are null and void, as being contrary to the public. (*y*) And in every policy of insurance there is an implied term or proviso that the insurance shall not extend to cover any loss from capture of enemies' property by the British government on the breaking out of hostilities. (*z*) But the property of neutrals will be covered and protected by the policy; (*a*) and so will the property of all persons who have received a license to trade from the crown. (*b*) If a foreigner consigns goods to merchants in this country on his own account and risk, and the consignees make advances to such foreign consignor in respect of the consignment, and insure the goods on his account, and a war breaks out which prevents the consignor from suing upon the policy in the courts of this country, the consignees can not avail themselves of the policy for the purpose of recovering the amount of their advances from the underwriters, although it was made in their names as interest might appear. They should have insured their interest in the first

(*x*) *Harratt v. Wise*, 9 B. & C. 712.
Naylor v. Taylor, *Ib.* 718.

(*y*) *Furtado v. Rogers*, 3 B. & P.
 191. *Esposito v. Bowden*, 7 Ell. &
 Bl. 763.

(*z*) *Brandon v. Gurling*, 4 East, 417.
Kellner v. Le Mesurier, *Ib.* 396.

(*a*) *Visger v. Prescott*, 5 Esp. 186.
 (*b*) *Usparicha v. Noble*, 13 East,
 332.

instance. (*c*) When a capture has been made, whether legal or not, the underwriters are liable for the expenses of a compromise made *bonâ fide* to prevent the ship's being condemned as a prize. (*d*) If the capture does not take place until after the goods have been landed, the underwriters are not liable, as the voyage is terminated, although the goods may never have come to the possession of the consignees. (*e*)¹

1167. *Restraints and detainments of kings, princes, and people.*—The word "people" comprehends nations in their collective capacity, and not bodies of insurgents acting in opposition to their rulers. "It means the supreme power of the country, whatever it may be;" and, therefore, if a corn vessel is seized and detained by a hungry mob or a party of rebels, the loss resulting therefrom is not covered by the policy; for it is not a detention by the "people." (*f*) But, if it be made by order of the executive officers of a foreign government, or by any foreign prince, potentate, or power, it is otherwise. (*g*) The clause does not extend to losses by detention by the British government, or by officers acting under its authority, unless the detention be unlawful. A foreigner, therefore, can not sue any British subject in the courts of this country for such losses, (*h*) unless he can show that it was an erroneous or unlawful detention. (*i*) The insurance

(*c*) *Conway v. Gray*, 10 East, 536. 783.

But see *Aubert v. Gray*, 3 B. & S. 163;
32 L. J., Q. B. 50.

(*g*) *Rotch v. Edie*, 6 T. R. 413.

(*h*) *Touteng v. Hubbard*, 3 B. & P.

(*d*) *Berens v. Rucker*, 1 W. Bl. 313. 291.

(*e*) *Brown v. Carstairs*, 3 Campb.
160.

(*i*) *Mullet v. Shedden*, 13 East, 304.

Lozano v. Janson, 28 L. J., Q. B. 337

(*f*) *Nesbit v. Lushington*, 4 T. R. 2 El. & El. 60.

¹ *Simpson v. Charleston Ins. Co.*, *Dudley (S. C.)* 239. The legality of the seizure is a question for the courts of the country to which the vessel belongs. *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270; 13 Pet. 415.

against the risk of detention by princes will not extend to cover any loss happening in the course of any contraband adventure in which the goods become liable to seizure as forfeited by the laws of this country, (*k*) or by the laws of any foreign country, unless the underwriter has notice of the intention of the assured to engage in a foreign smuggling transaction, and accepts the increased risk, in which case he will be liable upon the policy, as our courts do not take notice of the revenue laws of foreign governments. (*l*) If the detention arises from the captain's having carried simulated papers, or from his having neglected to provide proper national documents for his vessel, the underwriters will be discharged, (*m*) unless they have received notice of the intention so to trade, and have accepted the increased risk, and the trading with simulated or defective papers is not unlawful by the laws of this country, but is resorted to in the furtherance of British commerce. (*n*) A detention from fear of an embargo at the port of destination is not a detention within the meaning of the policy. And, if by reason of a hostile embargo suddenly laid on the destined port, the further prosecution of the voyage becomes impracticable, and the ship returns, and the voyage is lost, the loss is not a loss by restraint or detainment. (*o*) Where goods insured from Shanghai to London via Marseilles arrived at Paris, but that city was immediately afterwards so completely surrounded and invested by the German armies who were then besieging it that it was impossible to remove the goods from it, it was held that there was a loss by "restraint of

(*k*) *Brandon v. Curling*, 4 East, 416.

(*l*) *Planché v. Fletcher*, 1 Doug.

251. *Holman v. Johnson*, 1 Cowp.
343.

(*m*) *Bell v. Carstairs*, 14 East, 374.

(*n*) *Bazett v. Meyer*, 5 Taunt. 824.

(*o*) *Forster v. Christie*, 11 East, 205

princes," and that the assured was justified in abandoning the goods. (*p*) Every foreigner is deemed to be a party to the public authoritative acts of his own government; and a detention by order of such government is as much his act as if it proceeded immediately from himself. He can not, therefore, make a loss resulting from such a detention the foundation of a claim for indemnity against any British subjects in the courts of this country, (*q*) unless the insurance is expressly directed against such a contingency, and the insurer has expressly agreed to take upon himself such a risk. (*r*) If the detention of goods takes place whilst they are on board the vessel at the port of destination, before the risk in the policy ceases, the underwriters are responsible; but, if the goods have been safely landed and are then seized, they are discharged from liability. (*s*) The underwriters are sometimes exempted, by the express terms of the policy, from responsibility in case of confiscation, seizure, and capture in port. In these cases, whether the vessel was or was not at her port of discharge is a question of fact for a jury, to be determined by reference to custom and usage, as defining the limits of the port. (*t*)

1168. *Peril of barratry of the master and crew.*—

Barratry, a term derived from the Italian word "bar-rattare," to cheat, may be defined to be any species of fraud or cheating by which the owners or insurers are injured, (*u*) such as running away with the ship; or fraudulently carrying her out of her course; or sink-

(*p*) *Rodocanachi v. Elliott*, L. R., 8 160.
C. P. 649; 42 L. J., C. P. 247.

(*q*) *Campbell v. Innes*, 4 B. & Ald. 423. But see *Aubert v. Gray*, 32 L. J., Q. B. 50; 3 B. & S. 163.

(*r*) *Simeon v. Bazett*, 2 M. & S. 98.

(*s*) *Brown v. Carstairs*, 3 Campb.

(*t*) *Reyner v. Pearson*, 4 Taunt. 662.
Levy v. Vaughan, Ib. 387. *Levin v. Newnham*, Ib. 722. *Mellish v. Staniforth*, 3 Taunt. 499.

(*u*) *Vallejo v. Wheeler*, 1 Cowp. 154. *Earle v. Rowcroft*, 8 East, 126.

ing or deserting her ; or fraudulently defeating or delaying the voyage ; embezzling the cargo ; smuggling ; (x) cruising for and taking prizes without the sanction and authority of the owner ; (y) sailing out of port without paying port dues or in breach of an embargo, whereby the vessel or cargo is confiscated or lost ; trading with alien enemies ; or willfully and knowingly sailing to a blockaded port, whereby the ship is seized by a British cruiser ; (z) and the act may be barratry, although it was done by the captain with no view of benefiting himself, but of securing some advantage for the shipowners. But barratry does not in our own law include simple negligence, unaccompanied by culpable misconduct, nor any act done in obedience to the commands of the shipowner, or from ignorance, or a mere error of judgment, or a mistake by the captain of the tenor of his instructions. (a) " Barratry," it has been observed, " is an act of fraud, not directed against the owner of the goods which are lost, but against the owner of the ship ; and, if the owner of the ship (he being sole owner) concurs in the act which causes the loss, it takes from it the character of barratry." But, if the owner of the goods is the freighter or charterer of the vessel, and the ship is under his orders and control, he is *pro hâc vice* the owner of the vessel, and the fraudulent conduct of the master and crew amounts to barratry as between

(x) *Dixon v. Reid*, 5 B. & Ald. 597. *Hucks v. Thornton*, Holt, N. P. 30. *Roscow v. Corson*, 8 Taunt. 684. *Ross v. Hunter*, 4 T. R. 33. *Havelock v. Hancil*, 3 T. R. 277.

(y) *Moss v. Byrom*, 6 T. R. 379.

(z) *Goldschmidt v. Whitmore*, 3 Taunt. 508.

(a) *Todd v. Ritchie*, 1 Stark. 240. *Stamma v. Brown*, 2 Str. 1174. *Phyn*

v. Royal Ex., 7 T. R. 505. *Grill v. The Gen. Iron Screw Collier Co.*, L. R., 1 C. P. 600 ; 35 L. J., C. P. 321 ; L. R., 3 C. P. 476. In the French law, " *Barraterie comprend toutes les especes, tant de dol, que de simple imprudence, défaut de soin et imperitie tant du patron que des gens de l'équipage.* " *Poth. Assurance*, No. 64.

him and them, although the shipowner may be a party to the fraud. A master who is a sole owner can not commit barratry, because he can not commit a fraud against himself; but, if a master, being also part owner, makes away with the ship in fraud of the other owners, that is barratry. (*b*)¹

1169. *Perils, losses, and misfortunes generally.*—The clause generally inserted in policies extending the insurance to “all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, &c., covers and protects all losses happening on the sea and in port, whilst the ship is in the due and customary

(*b*) Jones v. Nicholson, 10 Exch. 28; 23 L. J., Ex. 330.

¹ Wilcocks v. Union Ins. Co., 2 Binn. 574; Patapsco Ins. Co. v. Coulter, 3 Pet. 222; Stone v. National Ins. Co., 19 Pick. 34; Taggard v. Loring, 16 Mass. 336; Barry v. La. Ins. Co., 11 Mart. (La.) 630; Marcadier v. Chesapeake Ins. Co., 8 Cranch, 39. It has been said in England that a captain who is a part owner may commit barratry against his other part owners, and also against a charterer. But see, *contra*, Wilson v. Gen. Ins. Co., 12 Cush. 360; Thurston v. Col. Ins. Co., 3 Caines, 89; Ward v. Wood, 13 Mass. 539. If the owner be supercargo, consignee, or factor, the act is not barratry unless done in his capacity of master; it is then barratrous although he may fill other offices. Kendrick v. Delafield, 2 Caines, 67; Cook v. Comm. Ins. Co., 11 Johns. 40. Sometimes the policy provides that the insurers do not insure against barratry if the insured be owner of the ship; Paradise v. Sun Ins. Co., 6 La. Ann. 596; since such an insurance would insure a person against the acts of his own agent or servants. Such a provision, therefore, limits the insurance against barratry to a loss or injury of a cargo which is not owned by the owner of the ship. Brown v. Union Ins. Co., 5 Day, 1. “The policy of the law and obvious justice demand, that the owner and his master shall use care and diligence to prevent any misconduct of the crew; and if due care was wanting and might have prevented that misconduct, insurers are not liable for a loss caused by it.” 2 Parsons on C. 379.

prosecution of the voyage insured, and whilst the risk on the policy continues. If, therefore, a vessel is fired into and sunk by mistake, the loss is within this "sweeping clause" of the policy. If a vessel is lost or injured in port, whilst the policy continues in force, the loss will be covered by this clause; but the general words thereof are restrained in construction to perils of the same kind as those more particularly enumerated in the policy. (c)¹

1170. *Of the commencement of the risk.*—If the policy is on a ship or goods "lost or not lost," the indemnity extends to all past as well as all future losses. It is the same as if the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that, if the goods at the time of the purchase had sustained any damage by the perils of the sea, he would make it good. (d) Sometimes the risk is expressly

(c) Cullen v. Butler, 5 M. & S. 464. son v. Burnand, L. R. 4, C. P. 117.
 Phillips v. Barber, 5 B. & Ald. 161. (d) Sutherland v. Pratt, 11 M. & W.
 Naylor v. Palmer, 8 Exch. 739. David- 312.

¹ See as to collisions, Hale v. Washington Ins. Co., 2 Story, 176; Peters v. Warren Ins. Co., 3 Sumn. 389; Nelson v. Suffolk Ins. Co., 8 Cush. 47; Matthews v. Howard Ins. Co., 2 Story, 176. By the weight of American authority it appears that theft or robbery is a loss for which insurers may be held liable. 3 Kent Comm. 303, says that an insurer is not liable for a theft by a person on board the vessel and belonging to it; and he has been followed by Marshall v. Nashville Ins. Co., 1 Humph. 99; but see Atlantic Ins. Co. v. Storrow, 5 Paige, 285; Am. Ins. Co. v. Bryan, 1 Hill, 25; 26 Wend. 563; see also De Rothschild v. Royal Mail S. P. Co., 7 Exch. 734. But the insurers would not be liable for loss by theft or robbery without violence from others than the crew if the phrase "assailing thieves" is used, and that is now not uncommon. 2 Parsons on C. 379. Tortious conversion, and sale of insured property by a United States consul at a foreign port, under color of legal proceedings and claim of right, are not a loss within this phrase. Paddock v. Commercial Ins. Co., 2 Allen, 93.

appointed to commence from "the time of the vessel's being ready to sail," or "from the time of clearing," or "of her being ready for sea." When it is to commence "at and from" her arrival at a particular place, it will attach immediately on her first arrival at the port in such a seaworthy condition as to be enabled to lie there in safety, and will continue whilst she is lying at anchor preparing for the voyage for which she is insured. (e) But if there is any voluntary and unreasonable delay, the underwriter will be discharged; for his liability upon the policy is not to be subjected to the whim and caprice of a shipowner who may choose to let his ship lie and rot at her anchors. (f) If there has been a delay in the ship's arrival at the place, it is a question for a jury whether the delay materially varied the risk. (g) But the vessel must arrive "and have once been at the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." The safety required is a physical safety from the perils insured against, and not a freedom from political danger. (h) There is, in general, an express stipulation in all policies of insurance on goods and merchandise to the effect that the risk upon the policy shall commence from the loading of the goods on board the ship. In this case, and whenever an insurance is effected on goods and merchandise laden on board a particular vessel, the risk on the policy does not commence until the goods are safely shipped and stowed on board. If they are lost by the upsetting of boats or lighters, whilst they are being

(e) *Haughton v. The Empire Marine Insurance Co.*, L. R., 1 Ex. 205; 35 L. J., Ex. 117.

(f) *Chitty v. Selwyn*, 2 Atk. 359.

Palmer v. Marshall, 8 Bing. 79. *Smith v. Surridge*, 4 Esp. 25.

(g) *Hull v. Cooper*, 14 East, 479.

(h) *Parmeter v. Cousins*, 2 Campb 237. *Bell v. Bell*, Ib. 478.

conveyed from the shore to the ship preparatory to the voyage, the underwriters will not be responsible for the loss.

Whenever, by the express terms of the policy, the adventure is to begin from the loading of goods on board at a particular place, the risk of the policy will not attach if no goods are taken on board at the place specified, (*i*) or if the vessel is lost before she arrives at the port of loading; (*k*) and the policy will not cover and protect goods previously taken on board, as the adventure had not commenced when those goods were received; "but this, being a strict construction, has been relaxed when there is anything on the face of the instrument to satisfy the court that the policy was intended to cover goods previously on board;" (*l*) and, therefore, if the policy is expressed to be made in continuation of a former policy, which former policy covered and protected the antecedent cargo, the goods previously laden on board, as well as those received on board at the subsequent place of loading designated in the subsequent policy, will be protected. (*m*) And, if the adventure is to commence on the goods "wheresoever loaded," the courts will give the words the largest signification, so as to cover all antecedent shipments. (*n*) Where part of an antecedent shipment was taken out at the loading port mentioned in the policy as the port from whence the adventure was to commence, and the whole cargo was inspected by custom-house officers for adjusting duties which

(*i*) *Royal Ex. Ass. Co. v. McSwiney*, 19 L. J., Q. B. 222; 14 Q. B. 661.

(*k*) *Halhead v. Young*, 6 Ell. & Bl. 312; 25 L. J., Q. B. 200.

(*l*) *Mellish v. Allnutt*, 2 M. & S. 106. *Rickman v. Carstairs*, 5 B. & Ad. 663.

(*m*) *Bell v. Hobson*, 16 East, 243. *Joyce v. Realm Marine Insurance Co.*, L. R., 7 Q. B. 580; 41 L. J., Q. B. 356.

(*n*) *Gladstone v. Clay*, 1 M. & S. 418.

were paid on it at that port, and was then put on board again with the knowledge of the underwriter, this was held to be in substance a re-loading of the whole cargo, so as to make it a cargo laden on board at the loading port mentioned in the charter-party. (o)

1171. *Of the duration and the termination of the risk.*—It is generally expressly provided in the policy that the risk shall continue as regards the ship, until she has arrived at her port of destination or port of discharge, and been moored at anchor in safety twenty-four hours, and, as regards the goods, until they have been safely discharged and landed. Where a ship was insured “at and from” Jamaica, and was lost in coasting from one port of the island to another, it was held that she was protected by the policy in moving from port to port in the discharge of her cargo, and in taking fresh cargo, in the prosecution of the outward and homeward voyage in the ordinary and usual manner. (p)¹ But a vessel is not protected in going about from port to port, or cruising round the whole island, in order to dispose of her cargo, in a manner that is not warranted by the ordinary usage and custom of trade, as the risk is thereby increased

(o) *Nonnen v. Kettlewell*, 16 East, 188. *Carr v. Montefiore*, 33 L. J., Q. B. 57, 257; 5 B. & S. 408. (p) *Crūkshank v. Janson*, 2 Taunt. 301. *Warre v. Miller*, 4 B. & C. 538.

¹ If the vessel be ordered off or into quarantine before the twenty-four hours have passed, the policy does not cease to attach; 2 *Parsons on C.* 367; but if she be safely moored, and continue safe through a storm or other peril, which begins either before or within the twenty-four hours, and is afterwards lost through the same storm or peril, she is not lost within the policy. *Id.*; *Bill v. Mason*, 6 Mass. 313. By arrival is meant the reaching the usual place of unloading. *Meigs v. Mutual Ins. Co.*, 2 Cush. 439; *Dickey v. United Ins. Co.*, 11 Johns. 358; *Zacharie v. Orleans Ins. Co.*, 17 Mart. La. 637; *Gray v. Gardner*, 17 Mass. 188.

to the detriment of the underwriter to an extent not contemplated at the time the insurance was effected. If the policy is on the ship until her arrival at the last port of discharge, and several ports are named in the policy some of which are blockaded, the risk on the policy will cease on the arrival of the vessel at the last unblockaded port. (q) But, if the vessel deviates from the voyage insured, and enters upon a fresh adventure, or goes to ports not named in the policy, through fear of the breaking out of hostilities, and of the ports of destination becoming hostile ports, the underwriters will be discharged. (r) Where a ship was insured for the outward voyage "to all or any of the ports or places in the East Indies, China, or elsewhere, until arrived at the last place of discharge on the outward voyage," it was held that the outward voyage terminated as soon as the outward cargo had been discharged, and that the risk could not be prolonged so as to cover goods taken on board at intermediate places, to be carried onwards to the more distant ports or places named in the policy. (s)¹

Where, in a policy of insurance on a vessel for the outward voyage, there is a clause giving her "liberty to touch, stay, &c., at any ports whatsoever to take on board and land goods," the clause will protect the vessel while she is stopping for the bonâ fide discharge of the outward cargo, and is at the same time availing herself of the opportunity of taking in merchandise, being at the time in the due prosecution of the outward voyage; but "the captain has no right to mix

(q) *Doyle v. Powell*, 4 B. & Ad. 781.
267.

(s) *Richardson v London Ass. Co.*,
(r) *Oliverson v. Brightman*, 8 Q. B. 4 Campb. 94.

¹ *Patrick v. Ludlow*, 3 Johns. Cas. 14; *Garrigues v. Coxo*
1 Binn. 592.

up together the two objects of disposing of the remnant of the outward cargo and procuring a homeward cargo at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceases to be the sole occasion for his stay at a particular port, these underwriters are discharged. (*t*) If the party effecting the insurance is ignorant of the particular port at which the goods will be shipped, as well as of the name of the ship and of the species of the goods, he may protect himself against loss by a general insurance of goods of a certain value to be sent to him by sea, whatever may be the ship they are sent in, or the place at which they are put on board. (*u*)

1172. *Arrival at the port of destination—Mooring in safety.* (*x*)—The extent and limits of the “port of discharge” are regulated by custom and usage; and the term as used in policies of insurance includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. Where a ship’s place of destination was “her Majesty’s Dockyard at Deptford,” and the vessel got to the dock gates, but could not get into the dock by reason of ice which blocked up the entrance, and she was accordingly moored in the river alongside the dock-gates, and was there driven on shore and totally lost, it was held that the underwriters continued liable, as she had never been moored in safety at her place of destination within the terms of the policy. (*y*) But, where a vessel was chartered for a voyage from Quebec to Wallasey Port, in the river Mersey, or as near thereto as she could safely get, and

(*t*) *Ld. ELLENBOROUGH*, *Inglis v. Vaux*, 3 Campb. 437. *Moore v. Taylor*, 1 Ad. & E. 25.

(*x*) *Lindsay v. Janson*, 4 H. & N. 704.

(*y*) *Samuel v. Royal Ex. Ass. Co.*, 8

(*u*) *Hunter v. Leathley*, 10 B. & C. 123.

there discharge her cargo, and the vessel arrived in the Mersey, and was towed abreast the Wallasey Port, but could get no further by reason of her great draught of water, and the captain then began to discharge the cargo in lumpers, and also discharged his crew, and after several days, when a considerable portion of the cargo had been discharged, the ship fell over on her side and was injured, it was held that the vessel had arrived at her place of destination, and that the risk on the policy ceased after she had been moored twenty-four hours in safety, although it appeared that the captain intended ultimately to carry the vessel into Wallasey Port with as much of the cargo as he could carry over the shallow part of the river intervening between his original anchorage and that port. (z) If a vessel has sprung a leak or received her "death wound at sea," but comes into port and casts anchor in apparent safety for twenty-four hours, and the mischief is not discovered until after the expiration of the time limited for the continuance of the risk on the policy, the underwriter will nevertheless continue liable, as it is obvious that the vessel never was in reality moored in safety at all. (a) But, although a ship is damaged, yet if she is not a mere wreck at the time of her arrival, and is moored as a ship in the possession and control of her owners, she is "moored in safety." (b) If an embargo is laid on all English vessels at a foreign port, and the vessel enters in ignorance thereof, and remains at anchor twenty-four hours, and is subsequently seized, the underwriters are liable; "for she is in the power of the enemy the very moment she enters the

(z) *Whitwell v. Harrison*, 2 Exch. 127.

(a) *Meretony v. Dunlope*, cited 1 T. R. 260, where it is stated that the verdict was given for the insured, whereas

the court, in *Knight v. Faith*, 19 L. J., Q. B. 517, treat the case as if the verdict had been for the insurer.

(b) *Lidgett v. Secretan*, L. R., 5 C. P. 198.

port, and is not for one minute moored in safety." (c) And, if, by reason of quarantine regulations or other laws of the port, the vessel is not lawfully moored, but is liable to be sent out of port to perform quarantine, or to be examined or fumigated, the risk continues on the policy, although the vessel may have remained at anchor more than twenty-four hours before any actual removal takes place, and before the port regulations against her moorings are enforced. (d) ¹

(c) *Minett v. Anderson*, Peake, 277. *Horney v. Lushington*, 15 East, 46.
(d) *Waples v. Eames*, 2 Str. 1243.

¹ "If the insurance is made 'at and from' a certain place, the risk begins as soon as the vessel is at that place, and continues while she is there, and also when she leaves that place. The question has arisen, what must be the condition of the vessel on her arrival, for the policy to attach? It has been said that she must then be in safety from the perils insured against. And as an insurance to a place does not cease until she has arrived there, and been there moored twenty-four hours in safety (and our policies usually contain a clause to that effect), it has been held, that a policy 'at' did not attach on the arrival of a ship until after the twenty-four hours of safety had expired. But it is obvious that the terms of the policy and the circumstances of the case must have much effect in the application of these rules."—2 Parsons on C. 365. See *Garrigue v. Coxe*, 1 Binn. 592; *Patrick v. Ludlow*, 3 Johns. Cas. 14; *De Longuemere v. Firem. Ins. Co.*, 10 Johns. 126. "Insurance 'from' a place begins only when a vessel casts off her moorings, or weighs her anchor, and moves, with the intention of sailing." 2 Parsons, *supra*; *Mey v. South Carolina Ins. Co.*, 3 Brev. 329. If a vessel is insured at and from A, to B, from thence to C and back to A, a loss at B will be covered. *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708; *Bell v. Marine Ins. Co.*, 8 S. & R. 98. Goods insured "at and from" a place, do not, unless it is expressly so provided in the policy (see *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204), come under the policy until laden on board the vessel, or on board a boat or lighter to be carried to the vessel in conformity with the usage of that place. *Coggeshall v. Am. Ins. Co.*, 3 Wend. 283; *Parsons v. Mass. Ins. Co.*, 6 Mass. 208. But they would be covered by such a policy if brought there in a vessel from another place. *Gardner v. Col. Ins. Co.*, 2 Cranch C. C. 473.

1173. *Risk in landing the goods.*—When the insurance is on goods and merchandise, it is generally expressly provided in the policy that the risk shall continue until the goods have been safely discharged and landed; but, whether there is such a provision or not, the risk upon the policy will continue from the time of the loading of the goods on board to the time of their being actually landed at the port of destination. (e) Any loss or damage, therefore, sustained in the transshipment of the goods from the vessel to the shore by the upsetting or stranding of boats or lighters, will have to be made good by the underwriters, provided the transshipment is made in the or-

(e) Anon., *Skinner*, 243.

If the insurance be to a port of discharge it continues at and from such ports as the vessel may touch at for inquiry, advice or repair, without discharging any part of her cargo. *Coolidge v. Gray*, 8 Mass. 527; *Lapham v. Atlas Ins. Co.*, 24 Pick. 1; *King v. Hartford Ins. Co.*, 1 Conn. 333; *Clark v. United Ins. Co.*, 7 Mass. 365. Any such expression as "final port," or "ports of discharge," would continue the insurance on so much of the cargo as is not there discharged. And if the insurance be to a port of discharge the insurance ceases when the cargo is actually unladen at any port, whether it be the port originally intended or another. *Moffat v. Ward*, 4 Doug. 31, note; *Shapley v. Tappan*, 9 Mass. 20. Sometimes it is provided that the insurance is for a definite period, and if the vessel is "at sea" at the end of the time, the risk is to continue until her arrival at port or the port of destination. The phrases "at sea" and "on her passage" are the same; *Bowen v. Hope Ins. Co.*, and *Bowen v. Merchants' Ins. Co.*, 20 Pick. 275. But we consider the rule as now well settled. Said PARKER, C. J., in *Wood v. New England Ins. Co.* 14 Mass. 31: "A vessel is considered in that condition ('at sea') while on her voyage, and pursuing the business of it, although, during part of the time, she is necessarily within some port in the prosecution of her voyage." This has, however, been pronounced doubtful. See *Gookin v. New England Ins. Co.*, 8 Am. Law Reg. 362; *Am. Ins. Co. v. Hutton*, 24 Wend. 330; 7 Hill, 321. See *Eyre v. Marine Ins. Co.*, 6 Whart. 247; 4 Watts & S. 116; *Wood v. New England Ins. Co.*, 14 Mass. 31.

dinary and usual course, and according to the usage of the port and trade, (*f*) and is not made in the boats and lighters of the owner of the goods. If the latter sends his own lighters and servants for the goods, and receives them, the underwriters will be discharged, as the voyage is terminated, and the risk or the policy ceases, as soon as the consignee has got the goods into his own possession and under his own care and management. (*g*) If the goods are conveyed in public lighters, or in the boats or lighters of third parties, in accordance with the custom and usage of the port, the underwriters will continue liable until the goods are landed, unless such lighters or boats are in the possession and under the control of the consignee or owner of the goods, in which case the voyage will be just as much terminated as if they were his own lighters and boats, the goods being then actually delivered to him and in his possession. (*h*) On an insurance of goods on a voyage policy, until the same are safely landed at the port of discharge, "including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose. (*i*)¹ If a vessel is disabled

(*f*) *Stewart v. Bell*, 5 B. & Ald. 238.

& P. 430. *Strong v. Natally*, 1 B. & P., N. R. 18.

(*g*) *Sparrow v. Caruthers*, 2 Str. 1236.

(*i*) *Lane v. Nixon*, L. R., 1 C. P. 412; 35 L. J., C. P. 243.

(*h*) *Hurry v. R. Ex. Ass. Co.*, 2 B.

¹ "If goods are usually landed from a ship in a certain port by boats or lighters, they are not landed, but are under the policy, while on board the lighters. And this would be true if this mode of landing the goods was unusual, but justified by the necessity of the case. It has, however, been held, that if consignee sends his own lighter to receive the goods, they are delivered to him when put on board his lighter, and the insurance ceases." 2 *Parsons on C.* 367. They are not, however,

and obliged to put into port before the voyage is completed, and is not worth repairing, and is consequently abandoned, and the master tranships the goods, and after such transhipment the goods are lost the underwriters will be liable upon the policy. (*k*)

1174. *Insurance on profits.*—When profits expected to be realised from the carriage of merchandise are insured from the ordinary perils of the sea, and the ship is lost by a peril insured against, but the merchandise is brought safe to the port of destination by another vessel, there is no loss of profit within the meaning of the policy, and the underwriters are not responsible. (*l*)

1175. *Freight policies.*—The freight to be earned by the vessel on the performance of the voyage may be insured as well as the vessel itself, and the cargo laden on board. "The object of the contract is to protect the assured from being deprived by any of the perils insured against of the profit he would otherwise earn from the carriage of the goods. It is incumbent, therefore, on the assured to prove that, unless some of the perils insured against had intervened, some freight would have been earned, and evidence must be given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by perils insured against, would have been entitled to demand freight." (*m*) A policy

(*k*) *Plantamour v. Staples*, 3 Doug. S., 651; 28 L. J., C. P. 194.
 1; 1 T. R. 611, n. *Shipton v. Thornton*, 9 Ad. & E. 337. (*m*) *Ld. ELLENBOROUGH, Forbes v. Aspinall*, 13 East, 327. *Patrick v. Eames*, 3 Campb. 441.
 (*l*) *Chope v. Reynolds*, 5 C. B., N.

under a policy, until actually on the vessel insured. *Coggeshall v. American Ins. Co.*, 3 Wend. 283; *Parsons v. Massachusetts Ins. Co.*, 6 Mass. 208.

on money advanced on account of freight is in substance a freight policy. (*n*) When an express contract of affreightment, under which the shipowner is entitled to the freight insured, can be proved, the risk on the policy will commence from the time that the shipowner has put himself into a condition to earn the freight, by making the vessel ready for sea and placing her at the disposal of the charterer, whether any goods have or have not been actually shipped on board under the contract. (*o*) Thus, if a vessel is chartered for a voyage from A to B, the interest on the freight commences on the vessel's sailing from A, either in ballast or with a small quantity of goods for B, so long as she is starting solely with a view to the chartered freight. (*p*) But, if no express contract of affreightment can be proved, the risk will not attach on the policy until goods have been actually shipped on board under circumstances giving the shipowner a right to freight. (*q*)

When the insurance is on the freight to be earned on the outward and homeward voyage, and there is an express contract of charter-party for the outward and homeward voyage, the liability of the insurer will continue all through the outward and homeward voyage, whether any of the homeward cargo had or had not been taken on board at the time of the loss; (*r*) but, if the insurance is on freight to be earned out and home, and the insured has only made a contract of affreightment for the outward voyage, the liability of the

(*n*) Hall v. Janson, 4 Ell. & Bl. 508 ; 24 L. J., Q. B. 97.

(*o*) Thompson v. Taylor, 6 T. R. 478. Truscott v. Christie, 2 B. & B. 320. Devaux v. l'Anson, 7 Sc. 507 ; 5 Bing. N. C. 519.

(*p*) Barber v. Fleming, L. R., 5 Q. B. 59, 63. Foley v. The United Fire Ass. Co., L. R. 5, C. P. 155.

(*q*) Tonge v. Watts, 2 Str. 1251.

(*r*) Davidson v. Willasey, 1 M. & S. 313. Atty v. Lindo, 1 B. & P., N. R. 236.

insurer, as respects the homeward voyage, will not commence until an express contract of affreightment for the homeward voyage has been entered into, or until a return cargo or return merchandise has been shipped on board, giving the ship-owner a right to homeward freight. (*s*) Freight may be insured for a portion of the voyage as well as a cargo of goods; and, if an insurance on freight is effected on a voyage from A to B, the risk is not varied, and the underwriters are not discharged, because the vessel is in reality sailing from A to C, touching at B, and the assured has neglected to disclose that fact to the underwriters. (*t*) But, if the voyage is altogether a different voyage from the one insured, as, for instance, if the insurance is on the freight to be earned under a contract of affreightment for a particular voyage, and the voyage is subsequently altered, the underwriter will be discharged. (*u*) As regards the meaning of the term freight, it has been held that, if the master, in order to make up a full cargo, buys merchandise on behalf of the shipowner, and brings it home, the fair value of the conveyance of such goods may be included under the term freight in the policy. (*x*) But, although "freight" includes the interest of the owner in the carriage of his own goods, yet it will not extend to passage money. (*y*)

1176. *Loss of freight.*—To recover for loss of freight, a total loss by perils of the sea must be proved. If the master has the means of repairing a vessel which has sustained sea damage, and of shipping and bring-

(*s*) *Williamson v. Innes*, 8 Bing. 81, n.

(*t*) *Taylor v. Wilson*, 15 East, 330.

(*u*) *Sellar v. M'Vicar*, 1 B. & P., N. R. 25.

(*x*) *Flint v. Flemyng*, 1 B. & Ad.

45. *Devaux v. l'Anson*, 7 Sc. 507; 5 Bing. N. C. 519.

(*y*) *Denoon or Dinoon v. Home & Colonial Ins. Co.*, L. R., 7 C. P. 341; 41 L. J., C. P. 162.

ng home the cargo, and neglects to avail himself of the opportunities within his reach, the insured can not recover for loss of freight. (z) Where the insurance was on freight, and the ship was injured by perils of the sea, and obliged to put into port and land the cargo to re-fit, and part of the cargo was so wetted by sea-water that it could not be re-laden on board without imminent danger of ignition, unless it went through a process which would have detained the vessel six weeks, at an expense equal to the freight, and the master sold the goods, and, finding he could not obtain others, sailed on his voyage, it was held that the underwriters were not liable to make good the loss of the freight on these goods. (a)

1177. *Insurance on passage-money.*—When the insurance has been effected on passage money, and the ship is disabled and obliged to put into port for repairs, and great expenses are incurred in maintaining the passengers, there is no loss for which the underwriters are liable, if the vessel ultimately completes the voyage and earns the money. (b)

1178. *Deviation from the voyage insured.*—Every policy of insurance is effected upon the implied understanding that the vessel will proceed straightway and without unnecessary delay to her place of destination. If, therefore, she voluntarily deviates from her course to put into port, and is afterwards lost, the underwriters will be discharged, (c) unless it be shown that she went there under the pressure of necessity, (d) or for necessary repairs or purposes essential to

(z) *Philpot v. Swan*, 5 Law T. R., N. S. 183.

(a) *Mordy v. Jones*, 4 B. & C. 400.

(b) *Willis v. Cooke*, 5 Ell. & Bl. 647 ; 25 L. J., Q. B. 16. As to insurances against the charges and liabilities which

may be incurred under the Passengers' Act, 1852, see *Gibson v. Bradford*, 4 Ell. & Bl. 586 ; 24 L. J., Q. B. 159.

(c) *Elliot v. Wilson*, 4 Bro. P. C. 470.

(d) *Scott v. Thompson*, 1 B. & P. N. R. 181.

the safe prosecution of the voyage, (*e*) or to avoid pirates, or icebergs, or other dangers of navigation, (*f*) or that she went out of her way for the purpose of succoring a ship in distress, (*g*) or of procuring convoy, (*h*) or had liberty by the charter-party to make deviations or to call at different ports for trading purposes. If the voyage insured has been actually abandoned, and it has been determined to alter the ship's destination, the underwriters will be discharged; but a mere meditated change of destination, not carried into effect by an actual abandonment of the voyage, will not have that effect. (*i*) If a ship insured for one voyage sails upon another, and the same track for part of the distance leads towards both places of destination, and the vessel is taken before she arrives at the dividing point for the two voyages, the underwriters are nevertheless discharged, because there never was any inception at all of the particular voyage insured. (*k*) But, if there is an actual inception of the voyage insured, and there exists only an intention to deviate, and no deviation had in fact taken place at the time of the loss, the underwriters will remain liable. (*l*) And, if a loss occurs before any actual deviation has taken place, and the vessel afterwards deviates, the loss will fall upon the underwriters. (*m*) But a vessel, or goods, or freight, may be insured for part of a voyage as well as the whole distance; and, if a vessel is chartered from A to C, touching at B,

(*e*) *Weir v. Aberdeen*, 2 B. & Ald. 320. *Delaney v. Stoddart*, 1 T. R. 22.

(*f*) *The Teutonia*, L. R., 4 C. P. 171, 179.

(*g*) *Arnold, Ins.* 405. *The Jane*, 2 Hag. Adm. 345.

(*h*) *Bond v. Nutt*, 2 Cowp. 601.

(*i*) *Tasker v. Cunninghame*, 1 Bligh, 87. *Driscoll v. Bovil*, 1 B. & P. 313.

(*k*) *Way v. Modigliani*, 2 T. R. 32.

(*l*) *Foster v. Wilmer*, 2 Str. 12. *Heselton v. Allnutt*, 1 M. & S. 46.

(*m*) *Green v. Young*, 2 Ld. Ra 840; 2 Salk. 444. *Hare v. Trav* B. & C. 10.

and the vessel is insured from A to B, there is no pretense for saying that the underwriters are discharged merely because the vessel is going on to an ulterior place of destination which is not disclosed at the time they accept the risk. (*n*) And, if a ship is compelled by adverse circumstances in the course of her voyage to enter a port to victual, or repair or refit, or if she is compelled to cast anchor to pay toll, or to await a fair wind, she may avail herself of the opportunity to take in some additional cargo, provided no additional delay is thereby created. (*o*) But, if the circumstances rendering it necessary to go into port or to cast anchor have been designedly brought about by the assured, this is a fraud upon the underwriters which discharges them from liability.

If a ship, with goods on board insured on a voyage to a foreign port, learns in the course of the voyage thither that an embargo has been laid on all ships of her nation at that port, but there is a prospect of the speedy removal of the embargo, and she accordingly goes into port as near as she can safely get to the port of destination, and there waits a short time for the removal of the embargo with the intention of continuing the voyage, she will be protected by the policy in so doing. But, if she abandons the voyage and sails back to her port of outfit and is lost on the homeward voyage, (*p*) or if, through reasonable fear of an embargo, or of the ports of destination becoming hostile ports, she sails to a port not named in the policy, and so embarks on a new voyage or adventure, the underwriters will be discharged, as the new risk then run is not the risk they insured against. (*q*) If the vessel

(*n*) *Taylor v. Wilson*, 15 East, 330. Campb. 454.

(*o*) *Laroche v. Oswin*, 12 East, 131.

(*p*) *Blackenhagen v. Lond. Ass.*, 1

(*q*) *Oliverson v. Brightman*, 8 Q. B.

go^o out of her course in order to avoid a peril not insured against, and is lost, the underwriter will be discharged, but not if the peril sought to be avoided was covered by the policy. Thus, where loss from capture in a particular port was excepted from the policy, and the vessel ran out to sea and out of her course to avoid capture, and sailed to an adjoining port, and was lost from peril of the sea, it was held that the underwriters were not liable; (*r*) but where the vessel was insured against capture in port, and put to sea, and deviated from her course to avoid capture, it was held that they were liable. (*s*)

1179. *Unreasonable delay* at any place at which the vessel is authorized to touch is equivalent to a deviation; for it is an implied term of every contract of insurance that the voyage shall be performed without delay, unless liberty is given to the vessel to halt in her course; and consequently, if there are necessary stoppages, the adventure becomes a different adventure from that which the underwriters agreed to insure. (*t*) But if the delay is necessary and reasonable, the risk on the policy will continue, and the underwriters remain chargeable. (*u*)

1180 *Insurances on voyages to several ports and places.*—When the insurance is on a voyage to several ports and places named in successive order, and the final port of discharge is fixed, the general rule is that the vessel must go to them in the order in which they are named in the policy, unless a different intention is manifested by the policy, or unless a usage to the contrary be established; but, if they are not named in successive order, they must be taken in the

(*r*) O'Reilly v. R. Ex. Ass. Co., 4 Campb. 246.

(*t*) Mount v. Larkins, 8 Bing. 122.

(*u*) Phillipps v. Irving, 8 Sc. N. R.

(*s*) O'Reilly v. Gonne, 4 Campb. 249. 8.

order in which they occur in the usual and most convenient and practical course of the voyage, without reference to the shortest geographical distance; and, if the ship's final port of discharge is not fixed, but the vessel is at liberty to select any port that may be found most suitable as a discharging port, she may take any ports she is authorized to touch at in any order she may think fit. (x) Where a ship and freight were insured "at and from Pernambuco or any other ports in the Brazils to London, beginning the adventure upon the said ship," &c., on the termination of her cruise and preparing for her voyage to London, and the cruise terminated and the vessel put into Pernambuco to obtain a cargo, but, finding none, sailed to San Salvador, a Brazilian port, 500 miles distant, and was lost on the way, it was held that the sailing from Pernambuco to San Salvador was not a deviation, and that the policy was intended to secure the vessel from loss whilst she was procuring her cargo in some one or other of the Brazilian ports. (y) So, where a policy was at and from Martinique and all or any of the West India Islands to London, and the vessel sailed from Martinique to St. Domingo to take in her cargo, which was far away from the direct course from Martinique to London, it was held that there was no deviation. (z)

1181. *Licenses to touch at different ports and places.*—When, by the express terms of the policy, the vessel is to be "at liberty, in the outward or homeward bound voyage, to proceed, sail to, touch, and stay at, any ports or places whatsoever, without the same being deemed a deviation," the liberty extends only to

(x) *Andrews v. Mellish*, 5 Taunt. 502.

(y) *Lambert v. Lidgard*, 5 Taunt. 480.

(z) *Bragg v. Anderson*, 4 Taunt. 229.
Ashley v. Pratt, 16 M. & W. 471.
Pratt v. Ashley, 1 Exch. 257; 17 L. J., Ex. 135.

such places as are in the usual course of the voyage, and customarily resorted to by traders making such voyages. (*a*) A license of this kind will not enable the captain to alter the regular course of the voyage, or touch at any place or port for purposes unconnected with the main adventure, (*b*) or to stay an unreasonable time at places he is authorised to touch at; (*c*) and if he sails with convoy, it will not authorize him voluntarily to stay at places, when by so doing he will part company with the convoy. (*d*) Whenever a vessel is on a seeking voyage, and is to look about for some safe port of discharge, and has consequently "liberty to touch at any port or ports" in a particular sea "for orders or any other purpose," the assured will be entitled to make every call, stay, or delay which may be necessary for safety and for the due accomplishment of the object of the voyage. (*e*) Where the name of the place to which the vessel is to sail comprehends a particular town and harbor, and also an extensive district of coast, the policy will cover and protect only a voyage from the particular town and harbor, unless it appears that by maritime custom and usage the whole line of coast is considered, for insurance purposes, to be included under the name used in the policy. (*f*) An open roadstead is a port within the meaning of the term "port" in a policy, if it is used as such by seafaring persons, and is resorted to by shipping for the discharge and loading of cargoes and merchandise. (*g*)

- (*a*) *Lavabre v. Wilson*, 1 Doug. 873; 7 Bing. 517.
 284. (*f*) *Constable v. Noble*, 2 Taunt.
 (*b*) *Bottomley v. Bovill*, 5 B. & C. 403.
 218. (*g*) *Sea Ins. Co. v. Gavin*, 4 Bligh,
 (*c*) *Urquhart v. Barnard*, 1 Taunt. N. S. 578. *Brown v. Tayleur*, 4 Ad.
 450. & E. 248. *Cockey v. Atkinson*, 2 B.
 (*d*) *Williams v. Shee*, 3 Campb. 469. & A. 460. *Harrower v. Hutchinson*,
 (*e*) *Hunter v. Leathley*, 10 B. & C. L. R., 5. Q. B. 304.

Sometimes vessels are expressly insured for a general voyage to any ports or places whatsoever in port and at sea, in all places, at all times, and in all services, to the intent that the risk may be covered by the policy, whatever may be the employment of the vessel, and however long the duration of the voyage.

1182. Total loss and abandonment—Notice of abandonment.—If a ship insured for a particular voyage grounds on a sandbank and can not be got off, the loss is a total loss, although the ship still exists in specie. If she is disabled by stress of weather, and is so strained and shaken as not to be worth repairing, the loss is a total loss, although she still exists as a ship in the dockyard. And, when a vessel has been wrecked, the cargo is totally lost if no part of it can be recovered for the benefit of the assured. If a cargo is so much injured as to be unfit for conveyance to the port of destination, and has consequently been landed at an intermediate port to prevent its entire destruction, the loss is in contemplation of law, as between the underwriter and insured, a total loss, and the latter is entitled to recover the full amount of the insurance. (*h*) But in these cases, when the subject-matter of the insurance is not totally destroyed, the insured must, in order to recover the full amount of the insurance as for a total loss, abandon what remains, *i. e.*, he must make a cession of all his proprietary rights thereto to the underwriters, and give them notice of abandonment. The notice of abandonment is required in all cases to give the insurers the means of enquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure

(*h*) *Ionides v. The Universal Marine Association*, 14 C. B., N. S. 292 ; 32 L. J., C. P. 176.

all the benefit that can be derived from the wreck. It must be given "within a reasonable time after the assured receives intelligence of the accident, that the underwriter may be entitled to the benefit of what may still be of value." (*i*) The abandonment must be an unconditional and unreserved abandonment of the whole of the subject-matter of the insurance to the insurers or underwriters, unless the latter think proper to accept of a conditional abandonment. When the subject-matter of the insurance totally perishes, no notice of abandonment is necessary; for there is nothing to abandon. (*k*) And, when it is so far annihilated that it no longer exists in specie, a formal abandonment of the comparatively valueless remnants of what was once a ship or a cargo is not necessary to enable the assured to recover as for a total loss, (*l*) although, if these remnants are worth anything at all, or have been sold, the underwriters will be entitled to them, or to the value of them, or to the price they have fetched; for it is contrary to the principle of every contract of indemnity to permit the insured to recover more than the amount of the loss sustained. (*m*) If the insurance is on freight, and the voyage is lost by a peril insured against, so that the freight can not be earned by the insured, the loss is a total loss, and there is no need of an abandonment of freight; "for there is nothing to abandon." (*n*) If the adventure is brought to an end by a peril insured

(*i*) *Mitchell v. Edie*, 1 T. R. 613.
Knight v. Faith, 15 Q. B. 659. *Ger-
 non v. R. Ex., &c.*, 6 Taunt. 383.
King v. Walker, 33 L. J., Ex. 325;
 3 H. & C. 209. *Stringer v. The Eng-
 lish Ins. Co.*, L. R., 5 Q. B. 599.

(*k*) *Rankin v. Potter*, L. R., 6 H. L.
 Cas. 83; 42 L. J., C. P. 169.

(*l*) *Cambridge v. Anderton*, 2 B. &
 C. 691. *Allen v. Sugrue*, 8 B. & C.
 561.

(*m*) *Roux v. Salvador*, 4 Sc. 34.

(*n*) *Idle v. Roy. Ex. Ass. Co.*, 8
 Taunt. 755; 3 Moore, 142. *Mount v
 Harrison*, 4 Bing. 388; 1 M. & P. 14
Rankin v. Potter, *ante*.

against, and the things are taken out of the power of the assured, as, for instance, if they are totally lost to him by reason of capture or seizure in a foreign port, or by political laws working detention and sale by a court, or by circumstances of distress and danger creating a mercantile necessity for a sale, there is no necessity for any notice of abandonment. (*o*) And, where the sale was not under a condemnation of any court, but took place because the assured declined to give security to prevent the sale, it was held that such sale was a total loss occasioned by the seizure, the giving of the security under the circumstances not being the course which a prudent uninsured owner would have adopted. (*p*) But it is otherwise where the sale is not a necessary or natural consequence of any of the perils insured against. (*q*) A constructive total loss as a total loss within the meaning of a policy against "total loss only." (*r*)

1183. *By whom notice of abandonment may be given.*—The party giving notice of abandonment must be the party in whom the property in the ship is at the time vested. Where, therefore, a policy of insurance has been deposited as security for an advance of money, the pledgee of the policy has no implied authority to give notice of abandonment; but it is otherwise with a person who has a mortgage on the ship. (*s*)

1184. *Form of notice of abandonment.*—The word "abandon" need not be used; any words showing an

(*o*) *Farnworth v. Hyde*, 34 L. J., C. P. 207; 18 C. B., N. S. 835. *Mullett v. Shedden*, 13 East, 304. *Mellish v. Andrews*, 15 Ib. 16.

(*p*) *Stringer v. The English, &c., Insurance Co., L. R.*, 4 Q. B. 676, 690.

(*q*) *De Mattos v. Saunders*, L. R., 7 C. P. 570.

(*r*) *Adams v. Mackenzie*, 13 C. B., N. S. 442; 32 L. J., C. P. 92.

(*s*) *Jardine v. Leathley*, 3 B. & S. 700, 32 L. J., Q. B. 132.

intention to give up the property insured upon the ground of its having been totally lost, will be sufficient. (t)

1185. *Effect of notice of abandonment.*—The effect of a notice of abandonment, therefore, is to put the assured into a condition to claim from the underwriters as for a total loss, provided the facts as they are, subsequently established warrant an abandonment. If they do not warrant an abandonment, or the insured neglects to give prompt notice of abandonment, he must proceed against the underwriters for the loss he has actually sustained. The assured then makes the best of what he can save, and resorts to the underwriter for the actual loss, after deducting the value of the remnants. On the other hand, when there is a constructive total loss and an abandonment, the risk of saving what remains to be saved is thrown upon the underwriter. After the abandonment, the insurer stands in the place of the insured, and is clothed with the ownership of the property saved, and is entitled to all the profits and advantages that may accrue therefrom; and if the assured recovers and retains possession of any portion of the property, the underwriters may maintain an action against him for the recovery of the value of it. (u) The abandonment is retrospective in its operation, so that the title of the abandonees relates back to the time of the loss. (x)

1186. *Insurance on freight.*—Where a ship and the freight to be earned on the voyage were insured by separate sets of underwriters, and the ship was captured, and the ship and freight were abandoned to the respective underwriters, who each paid as for a total

(t) *Currie v. The Bombay Native Ins. Co., L. R., 3 P. C. 72.*

(x) *Cammell v Sewell, 3 H. & N*

(u) *Leatham v. Terry, 3 B. & P. 644; 27 L. J., Ex. 447.*

loss, and after that the ship was recaptured, and then performed her voyage and earned freight, it was held that the underwriters on the ship were entitled to the freight so earned, to the exclusion of the underwriters on the freight; "for freight follows as an incident the property in the ship." (*y*) The insured ship is, by the abandonment, vested in the underwriters from the time of the loss; and, as their ship earns the freight, they are entitled to it, as purchasers of the ship; (*z*) but if, at the time of the casualty, there is no freight pending, as, for instance, if the shipowner is carrying his own goods, the abandonment can give no right to freight. (*a*) Where, after an embargo on a ship, the ship and freight were abandoned to the respective underwriters, and the embargo was taken off, and the ship completed her voyage and earned freight, it was held that the shipowners had no right to the freight earned after the abandonment of the ship, and that the loss of freight was not demandable from the underwriters on freight, as it was not lost by means of the perils insured against, but by reason of the abandonment of the ship, which was the act of the assured themselves. (*b*) A total loss of the ship, therefore, does not necessarily involve a total loss of the freight. The ship may get to port a mere wreck, and deliver her cargo and earn freight, and the shipowner may elect to abandon and proceed for a total loss; but, if he does so, the underwriters of the ship will be entitled to the freight, and the assured will have no claim to any indemnity from the underwriters on freight for the loss of freight. Thus, where a ship and freight were separately insured by separate policies, and the ship

(*y*) Davidson v. Case, 5 Moo. 116.(*a*) Miller v. Woodfall, 8 Ell. & Bl.(*z*) Hickie v. Rodocanachi, 4 H. & 504; 27 L. J., Q. B. 120.

N. 466; 28 L. J. Ex. 273.

(*b*) M'Carthy v. Abel, 5 East, 388.

came into port greatly damaged, and after survey, was found not worth repairing, and was finally abandoned, but the cargo was safely landed, and the freight was earned and received by the shipowners, and was then handed over by them to the underwriters, as incident to the ship, which being done, the shipowners proceeded against the underwriters on freight for indemnity for loss of freight, it was held that they had no claim whatever in respect thereof, as the freight had been earned and actually received by the shipowners, and might have been retained by them for their own use, but for their subsequent voluntary election to abandon to the underwriters the ship, and to constitute such underwriters the owners of the damaged ship and the freight earned by it. (c)

But in all these cases where the underwriters are entitled to the freight after abandonment, the freight has been earned by the insured ship. If another ship finishes the voyage, the underwriters are not entitled to the freight, unless the substituted vessel is their vessel, or has been hired for their benefit by their agents. (d) And, if the goods in the ship are the property of the owner of the ship, and he is carrying them on his own account, the abandonees of the ship have no claim to freight. (e)

1187. *When the insured may abandon—Total losses.*—The general rule is that the insured may abandon in every case and claim for a total loss, when by the occurrence of any of the misfortunes or perils insured against, the subject-matter of the insurance is so injured or deteriorated as to render any further dealing

(c) *Scot Marine Insur. Co. v. Turner*, 17 Jur. 631; 4 H. L. C. 312, n. *Benson v. Chapman*, 8 C. B. 964.

(d) *Hickie v. Rodocanachi*, 4 H. & N. 467; 28 L. J., Ex. 273.

(e) *Miller v. Woodfall*, 8 Ell. & Bl. 493; 27 L. J., Q. B. 120.

with it in the mode contemplated at the time the policy was effected, worthless. If a vessel insured for a voyage is so much injured by perils of the sea that the cost of the repairs will be more than the vessel is worth when repaired, the assured may abandon and claim for a total loss. (*f*) But not if the vessel is worth repairing, and can be repaired and re-fitted for sea at an expense less than her value when repaired. (*g*) So, if a stranded vessel can by any means within reach of the captain be recovered and saved, the vessel can not be abandoned by the assured; and if the captain, to avoid the trouble of recovering the vessel, sells her as she lies, the sale will not entitle the assured to treat the loss as a total loss, and to abandon to the underwriters. (*h*) When a ship and cargo are so submerged that both must be got up together, the expenditure incurred in raising them is for the common preservation of both, and the cargo must contribute thereto as well as the ship, and the amount to be contributed by the cargo must be taken into account for the purpose of ascertaining whether or not the ship is a total loss. (*i*) The loss of the voyage has nothing to do with the loss of the ship; and the shipowner who has insured his ship can not abandon the ship merely because the voyage can not be completed and the freight earned. (*k*) If the policy is on freight, and the ship is detained by an embargo, the loss is *prima facie* total; but, if the embargo be taken off and she then earns freight, the loss is partial only. (*l*)

(*f*) *Young v. Turing*, 2 Sc. N. R. 762. *Irving v. Manning*, 2 C. B. 784. *Phillips v. Nairne*, 4 C. B. 358. *De Cuadra v. Swann*, 16 C. B., N. S., 772.

(*g*) *Moss v. Smith*, 9 C. B. 103; 19 L. J., C. P. 225.

(*h*) *Knight v. Faith*, 15 Q. B. 657; 19 L. J., Q. B. 509. *Gardener v. Sal-*

vador, 1 M. & Rob. 115. *Doyle v. Dallas*, *Ib.* 48. *Tanner v. Bennett*, R. & M. 182.

(*i*) *Kemp v. Halliday*, 34 L. J., Q. B. 233; 35 L. J., Q. B. 156; 6 B. & S. 723; L. R., 1 Q. B. 520.

(*k*) *Pole v. Fitzgerald*, Willes, 647.

(*l*) *Everth v. Smith*, 2 M. & S. 278

If the vessel is driven by stress of weather into port to repair and re-fit, and the master hypothecates the ship, freight, and cargo for the payment of these repairs, and the amount exceeds the value of the ship and freight, the loss is a total loss. (*m*) Where goods are, in consequence of the perils insured against, lying at a place different from their destination, damaged, but so that they can at some cost be put in a state to be carried to their destination, the question to be determined is, whether it is practically possible to carry them on, that is, whether to do so will cost more than they are worth, and in determining this there must be taken into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but there must not be taken into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. (*n*) Where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, there must not be taken into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened. (*o*)

The mere suspension or retardation of the voyage in the case of an insurance on goods and merchandise

(*m*) *Benson v. Chapman*, 7 Sc. N. R. Ins. Co., 35 L. J., C. P. 250; L. R., 2 525. C. P. 357.

(*n*) *Kidston v. The Emp. Marine* (*o*) *Farnworth v. Hyde*, *ante*.

is no ground of abandonment. (*p*) If, however, the voyage is not worth pursuing by reason of the delay or if salvage services have been rendered, and the assured has no means of paying them, he may persist in the abandonment, and claim as for a total loss; but, if it appears that he could probably have raised money to liberate the vessel, and that he made no exertion to do it, he can not treat the loss as a total loss; for he is bound in every case to exert himself to the uttermost of his power to prevent the loss from being a total loss. (*q*) If the ship, being disabled at sea, is deserted by her crew, and is subsequently detained for salvage, and the cargo, being of a perishable nature, is so much damaged as not to be worth sending to the place of destination after satisfaction of the claim of the salvors, the loss is a total loss. (*r*) If the cargo is taken out of the possession and control of the assured by the barratrous conduct of the master or crew, and some portion of it is afterwards recovered, the assured may nevertheless abandon and treat the loss as a total loss. (*s*) If the cargo can be transhipped and forwarded to the port of destination without any material deterioration or delay, the assured has no right to abandon it and claim for a total loss; but it is his duty to go on with the adventure and turn it to the best advantage, and to proceed against the underwriter for a partial loss, being the amount of the actual damage sustained by the peril insured against. (*t*)

II88. *Capture and re-capture and abandonment*
—*Embargo*—*Spes recuperandi*.—Capture by an en-

(*p*) *Anderson v. Wallis*, 2 M. & S. 240.

(*q*) *Thornely v. Hebson*, 2 B. & Ald. 518.

(*r*) *Parry v. Aberdeen*, 9 B. & C. 416.

(*s*) *Dixon v. Reid*, 5 B. & Ald. 597.

(*t*) *Hunt v. R. Ex. Ass. Co.*, 5 M. & S. 53. *Falkner v. Ritchie*, 2 Ib. 293.

emy or a pirate, or an arrest of princes, or an embargo entitles the assured to abandon and claim for a total loss, unless the embargo has been taken off, or the vessel has been re-captured and restored to the owners, or they have the immediate means of recovering the vessel, (*u*) and may reasonably be expected to take possession of it. (*x*) On re-capture by an English vessel the shipowner has a right to the restitution of his ship on payment of salvage; and, if the insurance is on the ship, and the ship is re-captured and placed within the power of the assured, the loss, which was before a total loss, becomes then only a partial loss, (*y*) unless the vessel is in a damaged and unseaworthy state, or the salvage and costs and expenses attendant upon the re-capture are likely to be more than the vessel is worth, and the voyage can not be advantageously prosecuted. If the vessel be captured and re-captured, and the assured neither has the vessel restored to him nor any means of obtaining possession of it, or if the consequences of the capture are such as to occasion a total obstruction of the voyage, "or render it not worth pursuing, if the salvage be high, if further expense be necessary, and the insurer will not, at all events, undertake to pay that expense, the loss continues a total loss, and the insured may abandon, notwithstanding the re-capture." (*z*) Where a ship was captured and re-captured, and sold in a distant country to pay the salvage, and the residue of

(*u*) *Goss v. Withers*, 2 Burr. 692. *Kleinwort v. Shepard*, 28 L. J., Q. B. 147. *Cologan v. Lond. Ass. Co.*, 5 M. & S. 455. *Wilson v. Foster*, 6 Taunt. 25.

(*r*) *Locano v. Janson*, 28 L. J., Q. B. 343; 2 El. & El. 160.

(*y*) *Hamilton v. Mendez*, 2 Burr.

1198; 1 W. Bl. 276. *Brotherston v. Barber*, 5 M. & S. 418. *Bainbridge v. Neilson*, 10 East, 329.

(*z*) *Dean v. Hornby*, 3 Ell. & Bl. 190; 23 L. J., Q. B. 129. *Milles v. Fletcher*, 1 Doug. 232. *M'Iver v. Henderson*, 4 M. & S. 584.

the proceeds remained in the court of Admiralty there, it was held that the assured might abandon and recover for a total loss. (*a*) If the insurance is on goods and merchandise, laden on board the vessel, and the vessel is captured, and notice of abandonment is given by the assured, and after that the vessel is re-captured with the goods and merchandise on board uninjured, the assured can not persist in his abandonment and claim for a total loss. (*b*) And, if the vessel is unable to complete her voyage by reason of an embargo suddenly laid on English vessels at the port of destination, or by reason of the hostile interference of an enemy, the assured can not, on that account, abandon the goods, and claim for a total loss, unless the goods have been deteriorated and injured, and rendered unfit for mercantile speculation and adventure. (*c*)

1189. *Unreasonable abandonment*.—"The privilege of abandoning," it has been justly observed, "is liable to great abuse. Where, as in the case of capture, the thing insured is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the spes recuperandi to the insurer. But it seems unreasonable that the owner of a ship which is stranded (the captain and crew, his servants, being on the spot and in possession of the ship and cargo), should be at liberty to abandon these to a number of underwriters, who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands but to the greatest disadvantage." (*d*) "I am not disposed," observes Lord ELLEN-

(*a*) *Pringle v. Hartley*, 3 Atk. 195.

P. 388. But see *Barker v. Blakes*, 9 East, 293.

(*b*) *Naylor v. Taylor*, 9 B. & C. 718.

(*c*) *Hadkinson v. Robinson*, 3 B. &

(*d*) *Marshall on Insurance*, p. 565 3rd ed.

BOROUGH, "to enlarge the grounds of abandonment against underwriters, a privilege which every one knows has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and it therefore becomes the court to watch every such case, and in no instance to enlarge that, which in its nature is only an average, into a total loss." (*e*)

1190. *Partial loss—Exception of partial losses.*—If a partial loss is sustained, and then the whole subject-matter of the insurance is totally lost from a peril except from the policy, the underwriters will not be responsible for the partial loss, unless it has occasioned actual pecuniary loss to the assured. (*f*) If a vessel loses a mast by a peril insured against, and is re-fitted, the loss is a partial loss; and, if the vessel then puts to sea, and is totally lost, the assured is entitled to be indemnified in respect of the partial loss, as well as the total loss; but, if, before the vessel is re-fitted, she is totally lost, the assured can not then recover in respect of the partial loss. (*g*) A memorandum is frequently introduced at the foot of maritime policies, exempting the underwriters from all partial losses upon certain articles and descriptions of merchandise, and from all partial losses not amounting to £5 per cent. upon other classes of merchandise, and from all partial losses upon ship and freight not amounting to £3 per cent., unless the loss be a general average and contribution loss. In many policies the underwriters exempt themselves from all partial or average losses of every description, excepting general average losses, so that they are not responsible at all upon the policy

(*e*) *Bainbridge v. Neilson*, 10 East, 343.

(*g*) *Stewart v. Steele*, 5 Sc. N. R. 941.

(*f*) *Livie v. Janson*, 12 East, 656.

unless there is a total loss, or unless there has been a general average contribution. When the policy is warranted "free from particular average," no damage short of the absolute destruction of the thing insured will amount to a total loss. An exemption of this kind opens a wide door to fraud, inasmuch as a direct premium is offered to the assured to turn every partial loss into a total loss, in order that it may be covered by the policy. (*h*)

1191. *General and particular average*—*Policies warranted free from average*.—The term "average" is used, in insurance contracts and trading adventures, to denote every kind of partial loss or damage happening either to the ship or the cargo, from any cause whatever. It has been truly observed, that ambiguities frequently arise from the indiscriminate use, in mercantile matters, of the word "average," which has no less than four different meanings amongst commercial men. In policies of insurance we constantly meet with the terms general average and particular average; the first signifies general average losses arising from the general contribution made by all parties interested in a ship or cargo towards a loss sustained by some for the benefit of all, under the circumstances previously described; and the second, the particular or partial loss sustained by the assured, not connected with the loss of any other party, and not occasioned by a general average contribution. For example, if a small portion of corn or flax receives damage from sea-water to the extent of £45, and the entire value of the whole cargo is £1,000, this is an average loss of $4\frac{1}{2}$ per cent. upon the whole, and is called "average" in mercantile phraseology; so that, if the cargo is warranted "free from average under £5 per cent.," the un

derwriters will be exempted from all responsibility in respect of this partial or average loss. (i) If a cargo of corn insured "free from average" receives damage from sea-water, and the vessel puts into port for the purpose of drying the corn and preventing its total destruction, and the corn is so much damaged that if brought home it could not have been sold for an amount exceeding the expenses of unshipping, drying it, and bringing it home, the loss is total; but, if the value of the corn in England would exceed these expenses, the loss is an average loss within the warranty exempting the underwriters from liability. An insurance on goods warranted free of average, unless general, is equivalent to an insurance against their total loss only. As a general rule, where the whole or any part of the cargo is capable of being sent in a marketable state to the port of destination without laying out more money than it is worth, the master can not sell, nor can the assured recover for a total loss. (k) But the effect of a warranty against particular average is merely to limit the operation of the insurance to a total loss of the subject-matter, and is not to prevent a recovery under the suing and laboring clause of extraordinary expense which may be incurred in preserving it. (l)

1192. *Insurance on separate bales or packages—Average and total losses.*—If the merchandise insured is packed in separate bales, hogsheads, or packages, and

(i) *Wilson v. Smith*, 3 Burr. 1550. *M'Andrews v. Vaughan*, 1 Park Ins. 252. *Mason v. Skurry*, *Ib.* 253. *Oppenheim v. Fry*, 33 L. J., Q. B. 267; 5 B. & S. 348.

(k) *Reimer v. Ringrose*, 6 Exch. 267; 20 L. J. Ex. 175. *Rosetto v. Gurney*, 11 C. B. 187. *Gt. Ind. Pen-*

ins. Rail. Co. v. Saunders, 30 L. J., Q. B. 218; 31 L. J., Q. B. 206; 2 B. & S. 266. *Booth v. Gair*, 15 C. B., N., S. 291; 33 L. J., C. P. 99.

(l) *Kidstone v. Empire Marine Ins. Co.*, L. R., 1 C. P. 535; *Ib.* 2 C. P. 357; 35 L. J., C. P. 250; 36 *Ib.* 156.

the insurance is effected on each bale, hogshead, &c., separately, and some bales or hogsheads are totally lost, and others saved, the loss of each separate bale, hogshead, &c., is a total loss pro tanto; (*m*) “but, when the insurance is upon the bulk, and the goods are all of the same species, unless the loss exceeds the value specified in the memorandum, there is no average or partial loss, and there can not, in such a case, be a total loss of a portion of the cargo.” (*n*) Where an insurance had been effected on goods generally, and several thousand bags of linseed were put on board, and, by the memorandum as to average, seed was warranted free from average, the Court of Exchequer Chamber thought it was necessary, in the natural construction of the terms of the policy, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the warranty could not apply to each bag in which the seed happened to be packed as a distinct object; (*o*) but, where the goods insured were described in the policy as “master’s effects,” and the memorandum was “free from all average,” and some of the goods thus insured were totally lost, and others were saved, it was held that, as the articles which constituted “master’s effects” were essentially different in their nature, and kind, and value, the insurer was liable in respect of the total loss of particular articles constituting “master’s effects.” To hold that, if the assured happens to be successful in rescuing any of the articles insured, even the clothes he may be wearing, he will thereby incur the penalty of forfeiting his assurance on the rest

(*m*) *Entwistle v. Ellis*, 2 H. & N. 555; 27 L. J., Ex. 105. *Davy v. Milford*, 15 East, 559.

(*n*) *Hills v. Lond. Ass. Co.*, 5 M & W. 569.

(*o*) *Ralli v. Janson*, 6 Ell. & Bl 422.

though they are all totally lost, would lead to a result quite at variance with the object for which the memorandum as to average was introduced into policies. (*p*) As soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated. (*q*)

If the contents of any particular package, hogshead, &c., separately insured, are not totally destroyed, the loss is then only a partial or average loss, and the underwriters are exempted, by the memorandum, from liability. (*r*) It is usual, therefore, to modify the effect of the memorandum by an express stipulation to the effect that the underwriters are to pay "average on each species of produce or package of manufactured goods, or on each ten, fifteen, or twenty hogsheads &c.," so as to give the assured a right to claim for an average or partial loss separately on each species, if the loss amounts to three or five per cent., although there may not have been a three or five per cent. loss upon the whole. This stipulation does not oust the claim of the assured in respect of a general average loss. (*s*) If several average or partial losses take place under three or five per cent. each, but the aggregate amount of the whole exceeds three or five per cent., the underwriters will be liable. (*t*) Whenever the policy is made free from average under so much per cent., and a loss happens, the proportion which the loss bears to the cargo must be calculated upon the cargo which was on board at the time of the loss. (*u*) The petty charges of primage and average, previously mentioned

(*p*) *Duff v. Mackenzie*, 3 C. B., N. S., 16.

(*q*) *Wilkinson v. Hyde*, *Ib.* 44.

(*r*) *Hedburg v. Pearson*, 7 Taunt. 154. *Navone v. Haddon*, 9 C. B. 43; 19 L. J., C. P. 161.

(*s*) *Hagedorn v. Whitmore*, 1 Stark. 157.

(*t*) *Blackett v. R. Ex. Ass. Co.*, 2 Cr & J. 244.

(*u*) *Rohl v. Parr*, 1 Esp. 444.

as incident to navigation, form part of the necessary and ordinary expenses of the voyage ; and the payment of them is not considered a loss within the meaning of the policy.

1193. *Of the exceptions of general average losses and stranding of the vessel.*—General average losses arising from general contribution by the owners of property exposed to a common peril of the seas, to make good a loss incurred for the preservation of the common property of all, must be made good by the underwriter under the general terms of the policy ; and, when they are excepted from the average clause, the underwriter, of course, continues responsible in respect to them, although he is exempted from liability in respect of all other partial or average losses. To the clause “ warranted free from average ” is frequently annexed, as we have already seen, the exception “ unless the ship be stranded.” By the stranding of the vessel, under such a clause, the exemption from average is destroyed ; and the loss falls within the general words of the policy, although it was not in any wise occasioned by the stranding. (*x*) It is said to be a rule that, where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbor upon the ebbing of the tide or natural deficiency of water, so that she may float again upon the flow of the tide, such an event is not to be considered a stranding within the sense of the memorandum ; but it is otherwise where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual and accidental occurrence. (*y*) Where a ship ran on some wooden piles four feet under water which had been erected in a river about

(*x*) *Burnett v. Kensington*, 7 T. R. 34. *Kingsford v. Marshall*, 8 Bing 210. *Roux v. Salvador*, 4 Sc. 1. 458 ; 1 M. & Sc. 657.

(*y*) *Wells v. Hopwood*, 3 B. & Ad.

nine yards from the shore, to keep up the banks, and lay on such piles until they were cut away, this was held to be a stranding within the policy. (z) But, if a vessel merely grounds on a rock and gets off when the tide rises, and pursues her voyage, this is not a stranding, though the vessel may be injured; "if it is touch and go with the ship, there is no stranding. (a) But, when the ship accidentally takes the ground and remains there for any time, this constitutes a stranding, without reference to the damage sustained by the vessel. (b) If the shore tackling, placed to keep the vessel upright when the tide leaves her, breaks, and she rolls over on her side and is stove in, this is a stranding. (c) Where a ship, having encountered bad weather, lost both her anchors, and had her masts cut away, was taken in tow by salvors, and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury, it was held that there was a stranding. (d) The stranding of a lighter, in which goods are being taken from the ship to the shore, is not a stranding of the vessel within the exception in the policy. (e) The stranding must of course, in all cases, take place during the voyage covered by the policy, and before the risk thereon terminates.

II94. *Suing and laboring clause.*—Where a ship-owner has incurred expense for the purpose of averting a loss of freight, he is entitled to recover under the suing and laboring clause so much thereof as was

(z) *Dobson v. Bolton*, 1 Park. Ins. 239. *Raynor v. Godmond*, 5 B & Ald. 225.

(a) *LD. ELLENBOROUGH*, *Macdougale v. R. Ex. Ass. Co.*, 4 Campb. 283.

(b) *Harriman v. Vaux*, 3 Campb. 429.

Barrow v. Bell, 4 B. & C. 736.

(c) *Bishop v. Pentland*, 7 B. & C. 219.

(d) *De Mattos v. Saunders*, L. R. ; C. P. 570.

(e) *Hoffman v. Marshall*, 2 Sc. 564.

reasonably incurred. (*f*) But, where an owner is sued for running down another vessel, and obtains a judgment in his favor, but is put to extra costs, he is not entitled to recover those costs under this clause. (*g*)

1195. *Valuation and adjustment of losses—Valued and open policies—Over-valued policies—Calculation of the value—Deduction for new materials.*—The question as to whether there is a total or partial loss is independent of the question whether the policy is valued or not valued. If the whole of the subject-matter covered by the insurance is lost, it is a total loss; if a part only is lost, the loss is a partial loss, the amount of which depends on the proportion the part lost bears to the whole subject-matter of the insurance. Thus if the policy is a valued policy, the value being admitted, the assured is entitled to be indemnified to the extent of the declared value in the policy, and is released, as previously mentioned, from proving the value, unless the valuation can be impeached by the underwriter. If the policy be an open policy, the value of the whole subject-matter of insurance must be proved. (*h*) If the policy can be shown to have been fraudulently overvalued, it will be void. But, if the declared value exceed the interest of the assured through some mistake or misapprehension, the loss will be adjusted in the same manner as if the policy were an open policy, and the computation be made by the real interest on board, and not by the value in the policy. (*i*) Where

(*f*) *Lee v. The Southern Insurance Co.*, L. R., 5 C. P. 397.

(*g*) *Xenos v. Fox*, L. R., 4 C. P. (Ex. Ch.) 665.

(*h*) *Tobin v. Harford*, 34 L. J., C. P. 37.

(*i*) *Le Cras v. Hughes*, 3 Doug. 81
See, however, *Barker v. Janson*, *ante*

several valued policies of insurance are effected upon the same vessel, valued differently, and upon a total loss occurring, the assured receives under some of the policies part of the sums insured, in an action upon another policy, he is only entitled to recover the difference between the amount received and the agreed value in that policy. (*k*) If the policy be an open policy on a ship the value is taken to be the sum the ship is worth to the owner at the port where the voyage commences, including stores, furniture, provisions, wages, advances to sailors, and all expenses of outfit to which are added the premium and costs of insurance. If it be an open policy on goods, the value is taken to be the prime cost of the goods as proved by the invoices and tradesmen's bills, adding thereto the shipping charges, and premium, and costs of insurance. The presumed value of the goods if they had reached their place of destination and been sold there, has nothing to do with the calculation of the outset value. The insurer has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset: he has no concern in any subsequent value. (*l*) If a ship insured has sustained a partial loss, as, for instance, if she has been damaged, and the damage has been repaired by the owner, the latter will not be allowed to receive from the underwriter more than two-thirds of the costs of the repairs, it being considered that a deduction of one-third ought to be made in favor of the underwriters, by reason of the owner's having the

(*k*) *Bruce v. Jones*, 1 H. & C. 769; (*l*) *Lewis v. Rucker*, 2 Burr. 1170.
32 L. J., Ex. 132.

benefit of new materials instead of old, (*m*) unless the vessel is on her first voyage. (*n*)

1196. *Of the standard of value and measure of depreciation.*—If a partial loss has been sustained on goods and merchandise, this loss is calculated and adjusted by comparing the selling price of the sound commodity with the selling price of the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i. e.*, it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated portion of loss to the standard by which the value is calculated (*i. e.*, to the declared value in the case of a valued policy, and to the invoice price, &c., in the case of an open policy,) “and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money.” (*o*) If part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. But, where one hogshead happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but, if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. This is to be found out, not by any price at the outset port, but at the port of

(*m*) *Poingdestre v. R. Ex., R. & M.*
378. *Da Costa v. Newnham*, 2 T. R. 49.
412.

(*n*) *Pirie v. Steele*, 2 Mood. & Rob
(*o*) *Usher v. Noble*, 12 East, 647

delivery, where the voyage is completed and the whole damage known. Whether the price there be high or low, it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound : consequently, whether the injury sustained be a third, fourth, or fifth of the value ; and, as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged. For instance, suppose the value in the policy to be £30, the goods are damaged, but sell for £40 ; if they had been sound, they would have sold for £50. The difference then between the sound and the damaged is a fifth : consequently, the insurer must pay a fifth of the prime cost or value in the policy, that is, £6 ; e converso, if they come to a losing market and sell for £10, being damaged, but would have sold for £20 if sound, the difference is one-half, and the insurer must pay half the prime cost or value in the policy, that is, £15. (*p*) To put the matter in another shape, " If goods valued at £100, and coming to a good market, would, if sound, have been sold for £120, but are so damaged as not to fetch more than £40, the loss will be that proportion of the prime cost (£100) which the difference between the price of the damaged and the price of the sound goods (£80) bears to the price of the sound, £120. Thus, if £120. : £80. :: £100. :—the answer is £66 13s. 4d. the true loss." (*q*) This mode of calculation furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the fluctuations of a ris-

(*p*) *Lewis v. Rucker*, 2 Burr. 1170

(*q*) *Marshall on Insurance*, 634, 3rd ed. *Johnson v. Sheldon*, 2 East, 581.

Hurry v. R. Ex. Ass. Co., 3 B. & P. 308. *Tunno v. Edwards*, 12 East, 488.

ing or falling market. The merchant in this way makes the market prices of the sound and damaged commodity serve "as the scales in which to weigh the depreciation." (r)

1197. *Liabilities of underwriters with reference to the amount of their subscriptions.*—The underwriter, are liable for total or average losses in proportion to the sums they have underwritten. Thus, if a man underwrite £100, upon property valued at £500, and a total loss happen, he shall pay £100, that being the amount of his subscription; and, if only an average loss, amounting to £60 or £70 per cent., then he shall pay only £60 or £70, being his proportion of the loss. The liability of the underwriter is not restricted to the amount of his subscription; for he may be subject to an average and a total loss in the same voyage, or for several average or partial losses amounting together to more than his subscription. (s) But the assured can not, of course, in any case, recover anything beyond that which is a strict indemnity for losses actually sustained. If several articles be insured for one sum, with a distinct valuation on each, as so much upon ship, and so much upon cargo, and no part of the cargo be taken on board, so that the risk upon that never attaches, the assured will recover only such a portion of the sum insured as the value of the article lost bore to the value of the whole. (t) In the case of open policies on freight, the usage is to calculate the loss upon the gross amount, and not upon the net value of the freight. (u) When part of the goods insured is saved, and the sal-

(r) Stevens on Average, 84.

(t) Amery v. Rogers, 1 Esp. 203.

(s) Le Cheminant v. Pearson, 4 Taunt. 367. Brooks v. M'Donnell, 1 Y. & C. 515.

(u) Palmer v. Blackburn, 1 Bing

vage exceeds the amount of the freight, the practice is to deduct the freight from the value of the goods saved, and to make up the loss upon the difference. (x)

1198. Signed adjustments.—When an adjustment has been made of the amount of the loss, and indorsed upon the policy and signed by the underwriter, this binds the latter unless he can show that it was made on wrong information, or under a mistake, or under the influence of misrepresentations. (y) The adjustment is not an absolute and final settlement which is to be conclusively binding upon the parties; (z) but, when the underwriter has once settled for the loss, he can not recover back the money he has paid, unless there has been actual fraud on the part of the assured. If he pays for a total loss, which afterwards turns out to have been only an average loss, he can not recover back his money, but must do the best he can with the property saved. (a)

1199. Right of the insurer to recover compensation where the loss or damage has been caused by the negligence of a third party.—After satisfaction made to the owner for the loss or damage, the insurer stands in the place of the insured, and is not only entitled to what can be saved or restored in specie, but also to compensation, when compensation is recoverable, for the injury; (b) and he is therefore entitled to sue the wrong doer in the name of the owner of the lost or damaged property, in order to recover compensation for such loss or damage. (c) If the policy is a valued

(x) *Boyfield v. Brown*, 2 Str. 1065.

(y) *Herbert v. Champion*, 1 Campb. 1966.

131. *Shepherd v. Chewter*, Ib. 274.

Gammon v. Beverley, 8 Taunt. 124.

(z) *Luckie v. Bushby*, 13 C. B.

878.

(a) *Da Costa v. Firth*, 4 Burr.

1966.

(b) *Randal v. Cockran*, 1 Ves. sen. 98.

(c) *Mason v. Sainsbury*, 3 Doug. 64

Yates v. Whyte, 5 Sc. 640 *Post*.

policy, the damages recovered will belong wholly to the underwriter, although the real value of the ship may exceed that stated in the policy. (*d*)

1200. *Non-inception of the risk—Over-insurance by mistake—Return of the premium.*—If the risk upon the policy never commences, the premium paid to the underwriter is recoverable by the assured, unless the policy has been rendered void by some positive fraud on the part of the latter. Where the risk has not been run, whether owing to the fault, pleasure, or will of the assured, or to any other cause, the consideration for the premium fails; but, if the risk of the contract has once commenced, there can be no apportionment or return of the premium afterwards. (*e*) If there are separate voyages and several risks to be run, some of the premiums may be returnable and others not; but, if there is one entire voyage, and one risk, and the risk has commenced, there can be no return of premium. (*f*) If the vessel sails in an unseaworthy condition, and there is no fraudulent representation or warranty of seaworthiness in the policy, and no evidence of fraud, the premium is returnable, as the underwriters' risk upon the policy never commenced, by reason of the seaworthiness of the vessel being, as we have before seen, a condition precedent to his liability. (*g*) If the policy be on goods to be laden on board the particular vessel, and no goods are put on board, the premium is returnable; (*h*) and, if part of the goods covered by the policy only are put on board, a portion of the premium corresponding

(*d*) North of England, &c., Insurance Co. v. Armstrong, L. R., 5 Q. B. 244.

(*e*) Stevenson v. Snow, 3 Burr. 1238. Tyrie v. Fletcher, 2 Cowp. 666.

Loraine v. Thomlinson, 2 Doug. 585.

(*f*) Berman v. Woodbridge, 2 Doug. 781.

(*g*) Penson v. Lee, 2 B. & P. 330.

(*h*) Martin v. Sitwell, 1 Show. 151

with the deficiency may be claimed back. (*i*) But, if the policy be on freight, the risk may, as we have seen, attach, although no goods have been put on board; and, if the risk once attaches, the premium can not be recovered back. (*k*) Where several policies have been effected, and, before the risk thereon has commenced, the interest turns out to be less than the amount insured on the whole, the assured is entitled to a reasonable return of premium upon all the policies; but, where an insurance has been effected by one or more policies, and the risk has commenced, and subsequent policies are afterwards signed, and a loss happens between the signing of the first and subsequent policies, the underwriters on the first will be liable in proportion to their subscriptions to the extent of the whole sum insured, and therefore the risk having been incurred by them, a return of the premium can not be claimed. (*l*) Where property has by mistake been insured for more than it is worth, the underwriter is bound to return the overplus premium; and, whenever it is established to be the custom and usage of trade to return a certain portion of the premium upon certain contingencies, the assured will be entitled to avail himself of the custom. (*m*) Clauses are frequently inserted in policies expressly providing for a return of part of the premium in certain events and contingencies. (*n*) Where an insurance was effected on a ship for a year, and part of the premium was to be returned "for every uncommenced month if sold or laid up," and the vessel had been laid up for several months within the year, but was employed

(*i*) *Horneyer v. Lushington*, 15 East, 46.

(*k*) *Moses v. Pratt*, 4 Campb. 298.

(*l*) *Fisk v. Masterman*, 8 M. & W. 165.

(*m*) *Long v. Allen*, 2 Park. Ins. 797.

(*n*) *Aguilar v. Rodgers*, 7 T. R. 421.

again within the year, this was held not to be such a laying up as entitled the assured to a return of premium. (o)

1201. *Void policy—Return of the premium.*—If a policy is rendered null and void by reason of a written misrepresentation or mis-statement made by the insured by mistake and without fraud, the insured will be entitled to a return of his premium. (p) But, if the insured has effected a fraudulent insurance with the view of cheating the underwriters, the law will not enable him to recover back the premium he has paid. (q) If the insurance is illegal, as, for instance, if it has been effected upon an unlawful voyage or adventure, such as a smuggling enterprise, or a trading with foreign enemies, or a trading in breach of the navigation laws, and is consequently void, the premium can not be recovered back if the unlawful voyage or adventure has been undertaken and both parties are in *pari delicto*; but there is a *locus penitentiæ*, so long as the contract continues executory. (r) And, if an insurance be effected on a trading adventure with foreign enemies, and be consequently illegal in its inception, so that the risk never commences, yet if it was always in the contemplation of the parties to obtain a license legalizing the trade, and they intended to insure a legal and not an illegal voyage, but from some mistake or misapprehension the license was not obtained in sufficient time to legalize the adventure and enable the assured to recover upon the policy, the premium paid for such insurance is recoverable, as there was no intention on the part of the assured to violate the law. (s) So, if

(o) *Hunter v. Wright*, 10 B. & C. 456.

714.

(r) *Johnston v. Sutton*, 1 Doug. 254.

(p) *Feise v. Parkinson*, 4 Taunt, Lubbock v. Potts, 7 East, 449.

640.

(s) *Hentig v. Staniforth*, 5 M. & S.

(q) *Chapman v. Fraser*, 1 Park Ins. 124.

the assured was ignorant of the illegality of the voyage at the time he effected the insurance and paid the premium, as, for instance, if he did not know that hostilities had broken out, and that the parties with whom he was trading had at the time become foreign enemies, the premium is recoverable. (*t*) Non-compliance with the requirements of Merchant Shipping Acts respecting the engagement of the crews of British vessels does not render the voyage illegal, but only furnishes ground for proceedings against the master for the breach of the statute. (*u*)

SECTION III.

OF FIRE INSURANCE.

1202. *Of contracts of insurance against peril of fire.*—When the underwriter, in consideration of a premium, undertakes to indemnify the insured against loss of, or injury to, property from fire, the contract is a contract of fire insurance, and the instrument by which it is effected is called a fire policy. In a contract of this kind, the insurers, after reciting the receipt of the premium, usually covenant or agree that, from a day named in the policy, unto, and inclusive of, another day named therein, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the insurer shall accept the same, they, the insurers, will make good any loss or damage by fire to the property insured, except loss or damage from fire caused by foreign enemies, &c. When the policy refers to printed proposals, as embodying the terms upon which the insurance is effected, these proposals

(*t*) Oom v. Bruce, 12 East, 125.

(*u*) Redmond v. Smith, 8 Sc. N. R.

form part of the contract, and the policy and proposals must be read and construed together. The insured must have a pecuniary interest in the property exposed to risk, or he must be accountable or responsible to some person for the safety or security of the property. (*x*) If he has no such interest or accountability the contract will be void at common law, independently of the 13 Geo. 3, c. 48, as being contrary to public policy, and holding out the strongest possible temptation to arson; but it is not necessary, to give the insured an insurable interest, that he should have the absolute property in the things insured. If he has a lien on them for money due to him, or if he holds them as a bailee, or depositary, or warehouseman, or as a commission agent, for sale, or as an artificer, or a common carrier, or is employing his work and labor upon them, he may lawfully insure them to their full value, and may keep up a floating policy upon them for his own benefit and the benefit of his present and future customers. (*y*) Where, however, the insurers had specially limited their liability to "goods on trust or on commission for which the assured are responsible," it was held that they were not liable for loss to goods sold, and in which the property had passed to the purchaser, although the assured held the delivery warrants for the convenience of paying the charges on the goods which were in bond. (*z*)

1203. *Parties entitled to the benefit of the insurance.*—By the 22 & 23 Vict. c. 35, s. 7, it is enacted, that the person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against

(*x*) Marks v. Hamilton, 7 Exch. 323.

(*y*) Lond. & North-West. Rail. Co. v. Glyn, 28 L. J., Q. B. 193; 1 El. & El. 652. Waters v. Monarch Ins. Co., 5 Ell. & Bl. 870; 25 L. J., Q. B. 102.

(*z*) North British & Mercantile Ins. Co. v. Moffat, L. R., 7 C. P. 25; 41 L. J., C. P. 1. And see Martineau v. Kitching, L. R., 7 Q. B. 436, 457; 41 L. J., Q. B. 227.

loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant. A purchaser of property insured against fire does not, by the purchase, acquire a right to the benefit of the policy. (*a*)

1204. *Things covered by the policy.*—An insurance on “household furniture, linen, and wearing apparel,” will not include linen drapery bought on speculation; (*b*) nor will an insurance on the “interest in an inn” include the profits of the publican’s trade; (*c*) nor an insurance on “an oil mill and millwright’s gear therein” include machinery in a separate detached building, although it is worked by the same moving power, and considered to be part of the mill. (*d*) If a building be described as of one class instead of another requiring a larger premium, the policy will be nugatory. (*e*)

1205. *Warranties.*—Every statement, condition, and representation, material to the risk, will amount to a warranty, but not statements and representations concerning matters which do not form the basis of the contract and regulate the risk. (*f*)¹

(*a*) Poole v. Adams, 33 L. J., Ch. 639. Lees v. Whiteley, L. R., 2 Eq. 143; 35 L. J., Ch. 412.

(*b*) Watchorn v. Langford, 3 Campb. 422.

(*c*) Wright v. Pole, 1 Ad. & E. 621.

(*d*) Hare v. Barstow, 8 Jur. 928.

(*e*) Newcastle Fire Ins. Co. v. Macmorran, 3 Dow. 255.

(*f*) Benham v. Un. Guar. &c., 7 Exch. 744. Baxendale v. Harvey, 4 H. & N. 450; S.C. nom. Baxendale v. Harding, 28 L. J., Ex. 236.

¹ If by the terms of the policy, it is avoided by any misrepre

1206. *Alteration of premises increasing the risk.*—In every policy of insurance against fire there is an implied promise or undertaking on the part of

sensation or concealment as to the distance of the building insured from other buildings, such representation or concealment will have that effect. *Jennings v. Chenango County Ins. Co.*, 2 Denio, 75; *Kennedy v. St. Lawrence County Ins. Co.*, 10 Barb. 285; *Wall v. East River Ins. Co.*, 3 Id. 370; *Barrett v. Saratoga, &c., Ins. Co.*, 5 Hill, 188; *Wilson v. Herkimer, &c., Ins. Co.*, 2 Seld. 53. All statements as to what precautions are to be or will be taken in the management of the insured property, such as that water casks shall be kept in an upper storey, or a watch kept, or an examination made at night, must be substantially complied with. *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Houghton v. Manufacturers' Ins. Co.*, 8 Met. 114; *Jones Manufacturing Co. v. Manufacturers' Ins. Co.*, 8 Cush. 82; *Hovey v. American Ins. Co.*, 5 Duer, 554; *Sheldon v. Hartford, &c., Ins. Co.*, 22 Conn. 23; *Crocker v. People's Ins. Co.*, 8 Cush. 79. But a statement in a notice of alterations by the assured, that a machine put up by them on the premises is designed "for burning hard coal," will not be considered an agreement to burn hard coal only, or not to use other fuel, should it become necessary, and can be used without increasing the risk. *Tillou v. Kingston Ins. Co.*, 7 Barb. 570. Where, in an application for insurance, referred to in the policy as forming part thereof, it was stated thus: "There is one stove-pipe passed through the window, at the side of the building; there will, however, be a stove-chimney built, and the pipe will pass into it at the side,"—held, that this amounted to a warranty that the chimney should be built within a reasonable time. *Murdock v. Chenango County Ins. Co.*, 2 Comst. 210. But mere mis-statements which are inadvertent, or not material, such, for instance, as to the distance of other buildings, which is not material, will not avoid the insurance, where the policy does not specially give it the effect of a warranty; *Gates v. Madison County Ins. Co.*, 2 Comst. 43; 1 Seld. 469; overruling the decision of the supreme court, 3 Barb. 73; see *Wall v. East River Ins. Co.*, 3 Seld. 374; nor will the erection of another building adjoining the one insured, by the person taking out the policy, without notice to the insurers, unless in case of a provision to the contrary, invalidate the policy, if no actual injury has resulted from such erection, although when the in

the assured that he will not, after the making of the policy, alter the premises so as to increase the risk. If he converts a house of two storeys into a house of three storeys the liability of the insurer is increased; the premium, if previously fair, has then become inadequate, and the underwriter is discharged. (*g*) It has been held that, if it is stated or asserted in the description of the premises in the policy, "that no fire is kept on the premises, and no hazardous goods deposited thereon," this refers merely to the ordinary state and condition of the property, and if, on some particular occasion, for some temporary purpose, fire is brought upon the premises, or hazardous goods are, temporarily or casually placed thereon, and a loss by fire consequently occurs, the policy is not forfeited and the underwriters are not discharged. (*h*) Where premises were insured as "a granary and kiln for drying corn," and the policy was to be void if the premises were not accurately described, or any alteration was made in the building, or the risk was increased, and on one occasion, in consequence of a barge laden with bark having been sunk in the adjoining river and the bark wetted, the assured permitted the bark to be dried gratuitously in the kiln, and the bark and kiln took fire, and the whole premises were destroyed, it was held that the underwriters were nevertheless liable upon the policy to make good the loss, on the ground that the stipulation as to subsequent alterations in the premises or the risk, referred to something per-

(*g*) *Sillem v. Thornton*, 3 Ell. & Bl. 882; 23 L. J., Q. B. 368.

(*h*) *Dobson v. Sotheby, M. & M.* 90.

insurance was effected, the building was in contemplation, and although preparations for its erection were under way. *Gates v. Madison, &c., Ins. Co.*, 1 Seld.; and see *Stebbins v. Glore Ins. Co.*, 2 Hall, 632.

manent and habitual, and not to a temporary matter; and it was observed that, if the plaintiff had either dropped his business of corn-drying, and taken up that of bark-drying, or added the latter to the former, the case would have come within the condition. (*i*)¹

1207. Notice of alterations.—If by the terms of the policy the assured is to give notice of the erection or use of new stoves or furnaces, or of the making of any alterations increasing the risk, and pay an increased premium, this, it has been held, refers to some permanent alteration or user, and not to a mere temporary or casual matter. (*k*) But the authority of these cases is somewhat doubtful; and it has recently been holden that, where by the terms of the policy, steam-engines, stoves, or any description of fire-heat other than common fire-places, are not to be used unless notice has been given and the use allowed, the policy will be avoided if a steam-engine with furnace attached is brought on the premises, and used only on one or two occasions for experimental purposes, and not in the business of the assured; (*l*) but it must be proved that the risk of fire was increased by the thing done. (*m*)

1208. Misdescription of the insured premises.—Where, by the terms of a policy, the houses, buildings, or other places where insured goods were deposited, were to be accurately described, and a lodger who had only one room in a house, effected an insurance upon goods therein, describing them as being in his “dwelling-house,” it was held that the descrip-

(*i*) *Shaw v. Robberds*, 6 Ad. & E. 83.

(*l*) *Glen v. Lewis*, 8 Exch. 617; 22 L. J., Ex. 228.

(*k*) *Pim v. Reid*, 6 Sc. N. R. 982.
Barrett v. Jermy, 3 Exch. 545.

(*m*) *Stokes v. Cox*, 1 H. & N. 533; 26 L. J., Ex. 113.

¹ See last note.

tion was sufficiently accurate. (*n*) A coffee-house keeper who does not furnish beds and lodgings for the night, does not carry on the trade of an inn-keeper within the meaning of a policy enumerating the trade of an inn-keeper as doubly hazardous, and requiring an increased premium for the insurance of buildings where it is carried on. (*o*) When mills are warranted to be worked by day only, and they are put in motion by means of shafts worked by steam power in an adjoining building, the warranty is not broken by the steam-engine and shafts being kept going all night to turn other mills, if it appears that the machinery of the insured mill was disconnected at night from the movable shafts, and that the mill itself ceased to work. (*p*)¹

1209. *Fraudulent concealment of circumstances materially affecting the risk.*—If any unusual and extraordinary risk is known by the assured to exist at the time the policy is effected, and is not disclosed to the underwriter, this is a fraudulent concealment, which deprives the assured of all right of action upon the policy. Where a warehouse adjoining a boat-builder's shop took fire, and the fire was apparently extinguished, and the boat-builder sent immediate instructions for the insurance of his shop and premises, without communicating the fact of the neighboring fire to the insurers, and the fire was not in fact extinguished, but broke out again on the following morning, and extended to the boat-builder's shop and premises, and consumed them, it was held that the con-

(*n*) *Friedlander v. Lond., &c.*, 1 M. & Rob. 171.

(*o*) *Doe v. Laming*, 4 Campb. 76.

(*p*) *Whitehead v. Price*, 2 C. M. & R. 447. *Mayall v. Mitford*, 6 Ad. &

E. 670.

¹ See last note.

cealment of the increased risk, from the recent existence of the adjoining fire, avoided the policy. (*q*)

1210. *Risks covered by the policy.*—As the insurers take upon themselves only the risk of fire, they will not be responsible unless there has been actual ignition of the property insured. If it has been damaged merely from atmospheric concussion caused by an explosion of gunpowder at a distance, (*r*) or from the heat or smoke of ordinary flues and chimneys which have been overheated and mismanaged, and there has been no outbreak of fire, they will not be responsible upon the policy. (*s*)¹ Where it was pro-

(*q*) *Bufe v. Turner*, 6 Taunt. 338.

Co., L. R., 1 C. P. 232; 35 L. J., C.

(*r*) *Everett v. Lond. Ass. Co.*, 19 C.

P. 60.

B., N. S., 126; 34 L. J., C. P. 299.

(*s*) *Austin v. Drewe*, 6 Taunt. 436.

And see *Marsden v. City & County Ins.*

¹ But see *Case v. Hartford Ins. Co.*, 13 Ill. 676, where the insurers were held liable for articles injured by heat; and it seems to be settled here that an explosion by gunpowder is a loss by fire. *Scripture v. Lowell Ins. Co.*, 10 Cush. 356; *Grim v. Phoenix Ins. Co.*, 13 Johns. 451; *Waters v. Merchants' Ins. Co.*, 11 Pet. 213. If a house struck by lightning is set on fire, the insurers are liable, but if it be destroyed without ignition, they are not. *Babcock v. Montgomery Ins. Co.*, 6 Barb. 637; 4 Comst. 326; *Kenniston v. Merchants' Ins. Co.*, 14 N. H. 34. A provision in a policy of fire insurance absolving the insurer from loss by fire which should result from explosion, will cover an explosion of a steam-engine covered by the same policy, as well as any external explosion. *Hayward v. Liverpool & London, &c., Ins. Co.*, 2 Abb. App. Dec. 349. So in marine insurance, the insurers are liable for a loss occasioned by the sinking of a vessel insured, when caused by fire, although the fire itself was caused by a collision which was not insured against. In that case the effect of the collision without the fire would have been only to cause the vessel to sink to her upper deck, when she might have been saved. *Insurance Co. v. Transportation Co.*, 12 Wall. 194. A loss by water used to extinguish a fire is now, we think, universally recoverable for, under a fire policy. See *Scripture v. Lowell Ins. Co.*, 10 Cush. 356, per CUSHING, J.; *Lewis v*

vided that the insurers should not be liable if the property should be burnt "by foreign enemies, or any military or usurped power," and it was set on fire by a mob excited by the high price of provisions, it was held that this was not a burning by an usurped power within the meaning of the proviso. (*t*) But, if the insurers exempt themselves from liability for losses by fire "happening from civil commotion," they will not be responsible for damage resulting from the incendiarism of a rebellious mob, or from an insurrection of the people. (*u*) The insurer who has paid a loss of this kind may sue the hundred upon the Riot Act in the name of the insured. (*x*) A policy contained an exception of "loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas;" an explosive vapour escaped and caught fire setting fire to other things: it afterwards exploded and caused a further fire, besides doing damage by the explosion: and it was held that the word "gas" meant ordinary coal gas, and did not include the explosive vapour, and that the exemption applied to the damage caused by the subsequent explosion and its consequences just as much as to a fire originated by explosion. (*y*)

Where a ship was insured for three months against

(*t*) *Drinkwater v. Lond. A. Co.*, 2 2 B. & C. 254. *Yates v. Whyte*, 5 Sc. Wils. 363. 640; 4 Bing. N. C. 272.

(*u*) *Langdale v. Mason*, 2 Park. Ins. 965. (*y*) *Stanley v. The Western Insurance Co.*, L. R., 3 Ex. 71.

(*v*) *Clark v. Hundred of Blything*,

Springfield Ins. Co., 10 Gray, 159; *Whitehurst v. Fayetteville Ins. Co.*, 6 Jones, 352; *Case v. Hartford Ins. Co.*, 13 Ill. 680; *Hillier v. Alleghany Co. Ins. Co.*, 3 Barr, 470; *Babcock v. Montgomery Co. Ins. Co.*, 6 Barb. 637; *Independent Ins. Co. v. Agnew*, 34 Penn. St. 96; *Tilton v. Hamilton Ins. Co.*, 1 Bosw. 367; *Webb v. Protection Ins. Co.*, 14 Miss. 3.

fire, and was described as lying in the Victoria wet-docks, with liberty to go into a dry dock for repairs, it was held that she was covered by the policy whilst passing along the Thames, in her way from the wet dock to the dry dock, but not whilst she was lying in the river for the purpose of re-fixing her paddle-wheels, or for purposes of repair. (z)

Under the words "from the 14th of February until the 14th of August," the whole of the 14th of August was held to be included. (a)

1211. Fires caused by negligence—Extraordinary risks.—One of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defense against the claim of the insured; and there is no distinction between the negligence of servants and agents and of the insured himself. (b) But the underwriters do not take upon themselves extraordinary risks, unless those risks are expressly brought to their notice, and are accepted and insured against by them at the time the policy is effected.¹

1212. Notice of loss.—Partial losses.—By the

(z) *Pearson v. Commerce Un. Ass.* Co., 15 C. B., N. S., 304; 33 L. J., C. P. 85; L. R., 8 C. P. 548. *Ante.*

(a) *Isaacs v. Royal Ins. Co., L. R., 5 Ex. 296.*

(b) *Busk v. R. Ex. Ass. Co., 2 B. & Ald. 73.*

¹ See *Mathews v. Howard Ins. Co., 13 Barb. 234*; overruling *Grim v. Phoenix Ins. Co., 13 Johns. 451*; *Hynds v. Schenectady Co. Ins. Co., 16 Barb. 119*; *St. John v. American Ins. Co., 1 Duer, 371*; *Henderson v. Western Ins. Co., 10 Rob. La. 164*; *Chandler v. Worcester Ins. Co., 3 Cush. 328*; *Johnson v. Berkshire Ins. Co., 4 Allen, 338*; *Gates v. Madison Co. Ins. Co., 1 Seld. 469*; *Copeland v. New England Ins. Co., 2 Met. 432*; *Putnam v. Monmouth Ins. Co., 35 Maine, 227*; *Catlin v. Springfield Ins. Co., 1 Sumner, 434*; *Insurance Co. v. Lawrence, 10 Pet. 517*; *Waters v. Merchants' Ins. Co., 11 Id. 213*,

terms of most contracts for insurance against fire, the insurer is required to give, within a certain number of days, notice of the loss to the insurers, and to deliver full particulars of the damage sustained, and prove the amount of it, and procure a certificate of his character and circumstances from the minister and churchwardens, or certain reputable inhabitants of the parish; and the strict performance of these things in point of time, and the substantial performance of them in other respects, constitute a condition precedent to the right of the assured to be indemnified for his loss. (c) By the term "full particulars" is meant the best particulars the assured can reasonably give. (d) When a partial loss only has been sustained of the property insured, the insured is, of course, entitled only to be indemnified to the extent of such partial loss. To permit him to recover more, and put himself in a better situation than he was in before the loss occurred, would, as previously observed, be totally opposed to the nature of a contract of insurance as a mere contract of indemnity. If a reasonable suspicion exists that houses or buildings situate within the bills of mortality have been insured for more than their value, and fired, but proof is wanting, the insurers may rebuild or repair at their own expense, and resist the claim of the assured for the money secured by the policy. (e)

1213. *Forfeiture of the policy—Non-payment of*

(c) *Roper v. Lendon*, 28 L. J., Q. B. 260; 1 El. & El. 825. *Worsley v.*

(d) *Mason v. Harvey*, 8 Exch. 819; 22 L. J., Ex. 336.

Wood, 6 T. R. 710.

(e) *Vernon v. Smith*, 5 B. & Ald. 1; and see *post*.

Perrin v. Protection Ins. Co., 11 Ohio, 147; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713.

premium—Days of grace.—Where the insurance is for a year, and so on from year to year, or for a quarter of a year, and so on from quarter to quarter, it is not kept alive after the expiration of the year or quarter by a mere proviso or condition giving a certain number of days of grace for the payment of the premium; but there should be an express stipulation that the insurance shall be continued and the property covered by the policy, until the expiration of the days of grace. (*f*) Where a policy of insurance against loss by fire from year to year provided that the assured should, “as long as the managers agreed to accept the same, make all future payments annually at the office within fifteen days after the day limited by the policy, upon pain of forfeiture of the benefit thereof, and no insurance is to take place until the premium be actually paid,” and a loss happened within fifteen days after the end of one year, but before the premium for the next was paid, it was held that the insurers were not liable, although the assured tendered the premium within the fifteen days, but after the loss: that the insurance was for a year, and not a year and fifteen days, and the policy at an end by non-payment at the very day; and that, the receipt of the premium being in the discretion of the insurers, they had clearly a right to refuse to continue the policy. (*g*) Where there was a condition in a policy that the assured “should forfeit all benefit under his policy,” if there was any false swearing in support of the claim he made, and the assured made an affidavit of damage to the amount of £1081, and the claim was contested,

(*f*) *Salvin v. James*, 6 East, 571.

(*g*) *ASHURST, J., Tarleton v. Stani-*

forth, 5 T. R. 700; 1 B. & P. 471
Simpson v. Accid. Death Ins. Co., 2
 C. B., N. S. 298.

and a jury gave a verdict for £500 only, the court granted a new trial. (*h*)

1214. *Divers insurances on the same property.*—If the insured has effected two or more insurances upon the same property, he can, as we have before seen, recover no more than his actual loss; and, when he has obtained a full indemnity from the one, he can not resort to the other; but, as he is allowed to fix on which insurer he pleases, the law permits the one who has been compelled to make good the loss, to resort to the others for contribution, and to recover from them a rateable proportion of the loss against which they have all insured. (*i*)

1215. *Insurances by warehousemen and bailees of the goods of their customers.*—A warehouseman, wharfinger, common carrier, or bailee of goods, may insure the goods which come to his hand from time to time, in the ordinary course of trade, and may keep up a floating policy for the protection of the goods of his customers deposited in his warehouse, or upon his wharf, or in his boats, barges, or wagons. (*k*) It is not necessary that the bailee should have had any previous authority from the owners to insure in order to give him an insurable interest, (*l*) nor that he should have made any charge for insurance, nor that he should be in anywise liable to make good to his customers the loss that has been sustained in order to entitle him to recover the full amount of the insurance from the insurers; (*m*) but he is not entitled, when

(*h*) *Levy v. Baillie*, 7 Bing. 349.

(*i*) *Davis v. Gildart*, 2 Park. Ins. 601. *Godin v. Lond. Ass. Co.*, 1 W. Bl. 103.

(*k*) *Lond. & North-West. Rail. Co. v. Glyn*, 1 El. & El. 652; 28 L. J., Q. B. 188. *Crowley v. Cohen*, 3 B. & Ad.

478.

(*l*) *Hagedorn v. Oliverson*, 2 M. & S. 485.

(*m*) *Waters v. Mon. Life Co.*, 5 Ell. & Bl. 880; 25 L. J., Q. B. 102. *Lond. & North-West. Ry. Co. v. Glyn*, 1 El. & El. 652; 28 L. J., Q. B. 188.

he has received the money, to appropriate it to his own use. The money is the money of the owners of the goods, and may be recovered by them from the insurer who has received it. (n)

1216. *Inability of the insured to sue when he has sustained no damnification.*—Policies against fire being contracts of indemnity, whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. If, therefore, the loss or damage insured against has been caused by the act or default of some wrong-doer, and the insurer has brought an action and recovered full compensation from such wrong-doer, he has then no ground to sue for an indemnity upon the contract of insurance; but, if the compensation he receives falls short of the real injury, an action would be maintainable for so much as would suffice to constitute a complete indemnity.

1217. *Rights of insurer and insured as against wrong-doers causing the loss.*—Every insurer has a right to be put in the place of the insured, and to use the name of the latter in order to recover compensation from a wrong-doer who has caused the loss. (o) If, therefore, the insurer has paid the amount of a loss caused by the wrongful act of a third party, he has a right to sue the latter in the name of the insured to recover compensation for the injury; and, if the insured receives from the insurer the amount insured, or full indemnity for his loss, and, after that, brings an action against, and obtains compensation from, a wrong-doer, he is not entitled to double satisfaction

(n) *Randal v. Cockran*, 1 Ves. sen. & El. 652; 28 L. J., Q. B. 192.

97. *Yates v. Whyte*, 5 Sc. 640. *Sideways v. Todd*, 2 Stark. 400. *Lond. & North-West. Rail. Co. v. Glyn*, 1 El.

(o) *Mason v. Sainsbury*, 3 Doug. 64. *Clark v. Blything*, 2 B. & C. 254; 3 D & R. 489.

and can not put the money into his own pocket, but is a trustee thereof for the benefit of the insurer, and is bound to hand it over to the latter.

1218. *Assignment of fire policies.*—A purchaser of property which is insured does not, by the mere fact of the purchase, and in the absence of any agreement to that effect, acquire any right to the insurance moneys. (*p*)

1219. *Laying out insurance money in re-building.*—By the 14 Geo. 3, c. 78, s. 83, the governors and directors of insurance offices are authorized, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers, or other parties effecting the insurance, have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in re-building, (*q*) Trade fixtures put up by a tenant, being removable by him, are not comprised in the expression “house or other buildings,” in the statute. Therefore, where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the Act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, makes no difference in this respect. (*r*) In order to entitle an owner to have the money laid out in re-building, he must make a distinct request to that effect to the insurance office before they have settled with the ten-

(*p*) Poole v. Adams, 33 L. J., Ch. 639.

(*q*) The operation of this section is not limited to the metropolis, but is of

universal application. Filliter v. Phippard, 11 Q. B. 347. *Ex parte* Gorely, 34 L. J., Bank. 1.

(*r*) Gorely, *Ex parte*, 34 L. J., Bank.

ant insuring; and in no case is the owner entitled himself to re-build and claim the policy money. (s)

SECTION IV.

OF LIFE INSURANCE.

1220. *Of contracts of life assurance.*—"The contract commonly called life assurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable." (t) This species of insurance is not, strictly speaking, a contract of indemnity; but it has so many features in common with those contracts that it is convenient to consider it along with them.

1221. *Contracts with de facto directors.*—A person who effects a policy with a life assurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the acts of parliament under which it is incorporated. (u)

1222. *Of the interest of the assured.*—By the 14 Geo. 3, c. 48, it is enacted (s. 1), that no insurance shall be made on the life of any person wherein the

(s) *Simpson v. The Scottish Union Lond. Ass. Co.*, 15 C. B. 387; 24 L. Insurance Co., 1 H. M. 618; 32 L. J., J., C. P. 6.
Ch. 329.

(u) *County Life Assurance Co., in*

(t) *PARKE, B, Dalby v. Ind. and re, L. R. 5, Ch. 288.*

person for whose use or benefit, or on whose account, the policy shall be made, shall have no interest, by way of gaming or wagering; that it shall not be lawful to make any policy on life or lives without inserting therein the name of the person interested therein, or for whose use and benefit, and on whose account, the policy was made; (x) and (s. 3) that, in all cases where the insured has an interest in such life or lives, no greater sum shall be recovered and received from the insurer than the amount or value of the interest of the insured in such life or lives; but nothing therein contained is (s. 4) to extend to insurances on ships, goods, or merchandises. If an insurance company lends money at interest upon the terms that the borrower do insure his life in double the money lent, the policy executed in furtherance of this agreement is not a gaming or wagering policy within the meaning of the statute. (y) The interest of the assured must be a pecuniary interest in the duration of the life insured; (z) such as the interest which a creditor has in the life of his debtor, (a) or a trustee in his trust moneys and revenues, (b) or a wife in the life of her husband who is bound by law to support and maintain her, (c) or the interest which a husband has in an annuity payable to his wife for life. (d) By the Married Women's Property Act, 1870, (e) a married woman may effect a policy upon her own life or the life of her husband for her separate use; and a pol-

(x) *Hodson v. Observ. Life Ass. Co.*,
9 Ell. & Bl. 40; 26 L. J., Q. B. 303.

Shilling v. Accid. Death Ins. Co., 2 H.
& N. 42; 27 L. J., Ex. 16. *Evans v.*
Bignold, L. R., 4 Q. B. 622.

(y) *Downes v. Green*, 12 M. & W.
490.

(z) *Halford v. Kymer*, 10 B. & C.

724.

(a) *Anderson v. Edie*, 2 Park. Ins.
914.

(b) *Tidswell v. Ankerstein, Peake*,
204.

(c) *Reed v. R. Ex. Ass. Co.*, 3 Peake
70.

(d) *Henson v. Blackwell*, 4 Hare
434.

(e) 33 & 34 Vict., c. 93, s. 10.

icy effected by the husband on his own life, for the benefit of his wife or children, will enure for the benefit of his wife for her separate use and of her children. Where a creditor promised his debtor that he would not exact payment of the debt during his life, but there was no consideration or other circumstances to make the promise binding, the court held that the promise did not give the debtor an insurable interest in the life of the creditor. (*f*) But a contract for employment at a fixed salary for a certain term gives the employed an insurable interest in the life of the employer. (*g*) If the assured has an insurable interest in the duration of the life at the time he effects the policy, and his interest afterwards ceases, he is not thereby prevented from suing upon the policy to recover so much of the sum insured as his interest in the life extended to at the time of the making of the policy. If, therefore, a creditor insures the life of his debtor for a certain sum, and the debt is paid, the creditor is not thereby deprived of his right of action upon the policy. (*h*) But, though upon a life policy the insurable interest at the time of the making of the policy, and not the interest at the time of the death, is to be considered, the insured can not recover from the insurers whether upon one policy or many, more than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons, and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so; but he can only recover or receive upon the whole the

(*f*) *Hebden v. West*, 3 B. & S. 579;
32 L. J., Q. B. 85.

(*g*) *Hebden v. West*, *supra*.

(*h*) *Dalby v. Ind. & Lond. Life Ass*

Co., 24 L. J., C. P. 3; 15 C. B. 365,
overruling *Godsall v. Boldero*. Law
v. Lond. Indisp., 24 L. J., Ch. 196.

amount of his insurable interest. If, therefore, he has received the whole amount from one insurer, he is precluded from recovering any more from the others. (*i*)

If the underwriter becomes bankrupt before the death has taken place and the amount insured has become payable, the interest of the assured in the policy may be valued and proved under the bankruptcy against such bankrupt underwriter. (*k*)

1223. Warranties—Conditions.—A statement respecting the life assured does not amount to a warranty unless it is made the basis of the contract, and was intended by the parties to have that effect; (*l*) but policies are generally granted subject to the condition that, if any untrue statement is contained in any of the documents addressed to the insurers in relation to the life insured, the policy shall be void. (*m*) By untrue statement is sometimes meant a statement that is willfully and designedly untrue. (*n*) In other cases the policy will be void if the statement is unintentionally untrue. When there is a warranty that the person whose life is to be insured is in good health, it means that he is in a reasonably good state of health, not that he is perfectly free from illness. If there is a warranty that the party is “free from any disorder tending to shorten life,” it does not mean that he has no disease at all; and it is not to be concluded that a disorder with which a person is afflicted at the time the insurance is effected is a disorder tending to shorten life, merely because he afterwards dies of it. (*o*)

(*i*) *Hebden v. West*, *ante*.

(*k*) *Cox v. Liotard*, 1 Doug. 166, 11.

(*l*) *Wheelton v. Hardisty*, 8 Ell. & Bl. 302; 26 L. J., Q. B. 265; 27 Ib. 241.

(*m*) *Cazenove v. Brit. Eq. Ass. Co.*, 28 L. J., C. P. 259; 29 Ib. 160.

(*n*) *Fowkes v. Manch., &c., Ins. A.*,

3 B. & S. 917; 32 L. J., Q. B. 153.

Perrins v. Marine & Gen. Ins. Co., 2

Ell. & Ell. 317; 27 L. J., Q. B. 242.

Sweeny v. Promoter Life Ass. Co., 14

Ir. C. L. R. 487.

(*o*) *Willis v. Poole*, 2 Park. Ins. 935

A warranty that the party whose life is insured "has not been afflicted with, nor is subject to, vertigo, fits, &c.," does not mean that the party has never had a fit in his life, but that he is not at the time the insurance is made, a person habitually or constitutionally afflicted with fits. (*p*) If the assured, or his broker, or the agent effecting the policy, merely says that he believes the life to be a good one, but will not warrant, the underwriter will be liable, unless he can show that the party so stating his belief knew that the life was not good. (*q*)

1224. *Fraudulent misrepresentation and fraudulent concealment* of circumstances material to be known to the underwriter naturally avoid life policies in common with all other contracts, the materiality of the mis-statement or concealment being a question for the jury. (*r*) Some policies, however, make the insurance company itself sole judge of the materiality or immateriality of the falsehood, and adopt the most stringent provisions against mis-statement, whether material or immaterial, known or not known to be untrue by the party making them, so that, observes Lord ST. LEONARDS, in a recent case, "I am bound to say, unless they are fully explained to the parties, a vast number of persons will be led to suppose that they have made a provision for their families by an insurance on their lives, when, in point of fact, the policy is not worth the paper on which it is written." (*s*) False answers given to verbal inquiries as to

Watson v. Mainwaring, 4 Taunt. 763.
Aveson v. Ld. Kinnaird, 6 East, 188.

(*p*) Chattock v. Shawe, 1 Mood. & Rob. 498.

(*q*) Stackpole v. Simon, 2 Park. Ins. 932.

(*r*) Lindenau v. Desborough, 8 B. & C. 586. Jones v. Provinc. Ins. Co., 3 C. B., N. S., 86.

(*s*) Anderson v. Fitzgerald, 4 H. L. C. 507. Towle v. The National Guardian Ass. Soc., 3 Giff. 42; 30 L. J., Ch. 900.

whether the life sought to be insured had been previously insured at other offices, have been held to be fraudulent misrepresentations avoiding the policy; (*t*) and so have false answers respecting spitting of blood, consumptive symptoms, &c., or concerning the general health and state and condition of the life assured. (*u*) If the insurer is referred for information to a former medical attendant of the life insured, and not to the immediate and usual medical attendant, such an omission to refer to the proper person will vacate the policy.

1225. *Principal and agent*.—If an untrue statement, or a concealment of a fact, or non-communication of a material circumstance, takes place through the instrumentality of an agent, the assured, who is to benefit by the policy, is bound by it, though he himself is not privy to the falsehood of the representation, or the non-communication of the material fact. But, where a party effects a policy on the life of another, the person whose life is assured is not the general agent of the person procuring the assurance, so as to make his false representations the false representations of the party procuring the assurance; and the same may be said of false representations of medical attendants and referees, unless these representations are expressly made the basis of the policy, or the parties making them are themselves the persons negotiating the contract. There is no analogy between the statements “of the life” or the referees in the negotiation of a life assurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy. (*x*) But policies may

(*t*) *Wainwright v. Bland*, 1 M. & W. 95.

32.

(*x*) *Wheelton v. Hardisty*, 8 Ell. &

(*u*) *Geach v. Ingall*, 14 M. & W. Bl. 232, 285; 27 L. J., Q. B. 241.

be framed making the assured responsible for any material misrepresentation or concealment by the "life" or the referees.

1226. *Indisputable policies.* — Many insurance companies issue prospectuses and transact their business on the terms that all policies effected by them shall be unquestionable or indisputable, unless obtained by fraud. (*y*)

1227. *Of the risks covered by the policies.* — "When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risks, unless there was some fraud in the person insuring, either by his suppressing circumstances which he knew, or alleging what was false." (*z*) Where, therefore, there is no express provision in the policy that in the event of the assured dying by his own hand, the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity. (*a*) But, if a man insures his own life for a certain sum to be paid to his executors after his decease, in consideration of annual premiums to be paid by him to an insurance company, the policy will be void, and the amount irrecoverable if he is killed in a duel, or feloniously destroys himself, or dies by the hand of the common hangman or public executioner. (*b*) In most policies, where parties insure their own lives, a condition is inserted making void the policy in case the party shall die by his own hands, or by the hands of justice, or in consequence of a duel; and it has been held that such a condition is not limited to felonious self-destruction, but extends

(*y*) *Wood v. Dwaris*, 11 Exch. 493.
Wheelton v. Hardisty, 8 Ell. & Bl. 264.

(*z*) *Ross v. Bradshaw*, 2 Park. Ins.

(*a*) *Horn v. Anglo-Austra. Ass. Co.*,
 30 L. J., Ch. 511.

(*b*) *Amicable Society v. Bolland*, 4
 Bligh, N. S., 194.

to all cases of voluntary self-destruction, so that, if a man destroys himself in a fit of phrensy or delirium, the insurers will be discharged from liability. (c) Such policies sometimes contain an exception to the effect that the policy in such a case shall not be void to the extent of any bonâ fide interest therein which at the time of such death shall be vested in any other person for a sufficient pecuniary or other consideration; and, where the assurance company with whom the policy was effected had advanced money to the assured upon mortgage and upon the deposit of the policy as a collateral security, it was held that they had such a bonâ fide interest, and that the policy was not void upon the suicide of the assured. (d)

If the life is insured for one year from the day of the date of the policy, and the death occurs that very day twelvemonth, the insurer will be liable; for "from the day of the date excludes the day." (e) But the word "from" may mean either inclusive or exclusive according to the apparent intention of the parties, to be gathered from the general context of the written instrument. (f)

1228. *Forfeiture of policies—Non-payment of premium—Days of grace.*—Whenever the policy is to become forfeited if the premium is not paid by a given day, but the policy may nevertheless be revived on payment of the premium within a certain extended period of time, it has been held to be essential to the revival of the policy, that the life assured is in being at the time of the payment and acceptance of the pre-

(c) *Clift v. Schwabe*, 3 C. B. 476; 17 L. J., C. P. 2. *Dormay v. Borradale*, 16 Ib. C. P. 337; 5 C. B. 380. *Moore v. Woolsey*, 24 L. J., Q. B. 40. *Dufaur v. Profess. Life Co.*, 27 L. J., Ch. 817.

(d) *White v. The British Empire Mutual Life Ass. Co.*, L. R., 7 Eq. 394.

(e) *Howard's case*, 2 Salk. 625.

(f) *Pugh v. Duke of Leeds*, 2 Cowp 714.

mium. (*g*) Where the policy was to continue provided the assured paid the premium within twenty-one days after it became due, and the premium became due and was not paid, and the assured died within the twenty-one days, it was held that the premium could not be paid and the policy kept on foot by his executors. (*h*) Many policies, however, expressly provide that in case any person on whose life any assurance shall have been effected shall happen to die after the premium has become due, but before payment, the assurance shall nevertheless be valid, provided the premium is paid within the days of grace. (*i*) The debiting by the insurer of the agent of the insured with the premium is not a payment to the insurer by the insured. (*k*) A claim under a winding-up in respect of a policy of life assurance is not affected by non-payment of the premium where the days of grace have not expired until after the commencement of the winding-up. (*l*)

1229. *Non-inception of the risk—Return of premium.*—When the policy is rendered null and void by reason of a mis-statement made by the assured by mistake, and without fraud, and the risk has never attached, the premium is, as we have already seen in the case of marine insurance, recoverable; but, if the policy is avoided by reason of the fraud or deceit of the assured or his agent, the premiums can not then be recovered back. (*m*) The policies of most insurance companies now provide, not only that the contract

(*g*) *Pritchard v. Merch. Life Ass. Co.*, 3 C. B., N. S., 642; 27 L. J., C. P. 169.

(*h*) *Simpson v. Accid. Death Ins. Co.*, 2 C. B., N. S., 295. *Want v. Blunt*, 12 East, 183. *Tarleton v. Stanforth*, 5 T. R. 695.

(*i*) *Prince of Wales Life Ass. Co. v. Harding*, 27 L. J., Q. R. 301; El. Bl. & El. 183.

(*k*) *Acey v. Fernie*, 7 M. & W. 151

(*l*) *In re Albert Ass. Co.*, *Cook's Policy*, L. R., 9 Eq. 703.

(*m*) *Duffell v. Wilson*, 1 Campf 401.

shall be void if there is any false statement or misrepresentation, on the part of the insurer, of any material circumstance, but that all the premiums that may have been paid upon the policy shall be forfeited to the insured, so that the policy may be avoided, and the premiums forfeited, by an innocent and unintentional mis-statement. (*n*) But Lord ST. LEONARDS, in a recent case in equity, draws a distinction between that portion of the proviso which is framed as a protection to the insurer by making his liability for the payment of the amount insured dependent upon a true and accurate statement of every material circumstance, and the penal part of the proviso working a forfeiture of the premiums; and intimates that such a construction should be adopted as will afford a fair security to the insurer from misrepresentation and mis-statement, on the one hand, and a just protection to the insured against the forfeiture, on the other, where there has been no willful mis-statement, or misconduct on his part. (*o*)

1230. *Waiver of forfeiture.*—If, after the policy has been forfeited by non-observance of a condition annexed to it, the insurers or their agent continue to receive the premiums with full knowledge of the breach of the condition, they will be deemed to have waived the forfeiture, and will not afterwards be permitted to avoid the policy. (*p*)

1231. *Assignment of life policies.*—Policies of life assurance, being choses in action, could not formerly be assigned, so as to give the assignee a right to maintain an action upon them in his own name.

(*n*) Duckett v. Williams, 2 C. R. & M. 348.

(*o*) Anderson v. Fitzgerald, 4 H. L. C. 484. Jones v. Provinc. Ins. Co., 3 C. B., N. S., 65; 26 L. J., C. P. 272.

Cazenove v. Brit. Eq., 5 Jur., N. S., 1309; 29 L. J., C. P. 160.

(*p*) Wing v. Harvey, 23 L. J., Ch 511. Armstrong v. Tarquand, 9 Ir. Com. Law Rep. 32.

But the assignment vested the equitable interest in the contract in the assignee, and entitled the latter to sue upon the policy, in the name of the party who was clothed with the legal interest, and who had the right of action thereon at common law. (*q*)

Now, however, by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), any person or corporation now being or hereafter becoming entitled, by assignment, or other derivative title, to a policy of life assurance, and possessing at the time of action brought, the right in equity to receive and give an effectual discharge for the moneys thereby assured, may sue at law in the name of such person or corporation to recover such moneys. By sect. 3, no assignment made after the passing of the Act is to confer on the assignee any right to sue, until a written notice of the date and purport of the assignment has been given to the assurance company at their principal place of business, which is to be specified in the policy (sect. 4); and the date on which the notice is received is to regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which the notice is received, is to be as valid as if the Act had not been passed. By sect. 5, the assignment may be made either by indorsement on the policy or by a separate instrument in the form given in the Act. By sect. 6, every assurance company to whom notice of assignment shall have been given, are, at the request in writing of the person giving the notice, and upon payment of a fee not exceeding five shillings, to deliver an acknowledgment in writing, under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company, of their receipt of

such notice; and such acknowledgment, if signed by a person being *de jure* or *de facto*, the manager, secretary, treasurer, or other principal officer of the assurance company, will be conclusive evidence as against the company of their having duly received the notice to which the acknowledgment relates. By sect. 7, the expression "policy of life assurance" or "policy" is to mean an instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "assurance company" is to mean and include every corporation, association, society, or company carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object. By sect. 8, the Act is not to apply to any policy of assurance granted or to be granted, or to any contract for a payment on death entered into, in pursuance of the provisions of the 16 & 17 Vict. c. 45, or the 27 & 28 Vict. c. 43, or to any engagement for payment on death by any friendly society.

Notice of the assignment should be given to the insurance company, not only for the purpose of securing a right to sue in the name of the assignee, but also in order to take the policy out of the order and disposition of the assignor in case of his bankruptcy, and prevent it from passing to the trustee. (r) An assignment of a life policy to secure a debt, with proviso for redemption, is an assignment by way of mortgage, and requires an *ad valorem* stamp as such. (s)

(r) *Ante*. Williams v. Thorp, 2 Sim. 257. *Ex parte* Colvill, 1 Mont. 110. *Ex parte* Tennyson, 1 Mont. & Bl. 67. Thompson v. Tomkins, 2

Drew. & Sm. 8. Green v. Ingham, L. R., 2 C. P. 525; 36 L. J., C. P. 236. Webb, *in re*, 36 L. J., Ch. 341.

(s) Caldwell v. Dawson, 5 Exch. 6.

Where a policy is to be void in case of suicide unless it has been legally assigned, any circumstances constituting a valid, equitable assignment of the policy will satisfy the proviso; (t) but an assignment by operation of law, such as an assignment by force of the Bankrupt Acts, is not within the proviso, and will not keep the policy on foot for the benefit of creditors. (u)

1232. *Right of the party interested in the policy to recover the assurance money.*—The liability upon a life policy is not affected by the question whether the party claiming the benefit of the policy has, or has not, been damnified by the happening of the contingency upon which the money becomes payable. Thus if a creditor insures the life of his debtor to the extent of the debt, and after the death of the debtor the executors of the debtor pay the debt to the creditor, the latter may nevertheless recover upon the policy the amount insured by him upon the life of such debtor. (x)

1233. *Appropriation of the funds of life assurance companies.*—By the 33 & 34 Vict. c. 61, s. 4, it is enacted that, "in the case of a company established after the passing of this Act, transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund, to be called the life assurance fund of the company,

(t) *Jones v. Consol. Ins. Co.*, 28 L. J. Ch. 66; 26 Beav. 256. *White v. The British Ass. Co.*, *ante*.

(u) *Jackson v. Forster*, 1 Ell. & Ell. 463; 29 L. J., Q. B. 8. *Moore v. Woolsey*, 4 Ell. & Bl. 255; 24 L. J., Q. B. 40.

(x) *Dalby v. Ind. & Lond. Life Ass. Co.*, 15 C. B. 390; 24 L. J., C. P. 8, overruling *Godsall v. Boldero*, 9 East, 72. *De Morgan on Probabilities*, p. 244, cited *Ib.* 393–397. *Law v. Lond. Indisp.*, 24 L. J., Ch. 196. *Ante*.

and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance; (y) and, in respect to all existing companies, the exemption of the life assurance fund from liability for other obligations than to its life policy holders shall have reference only to the contracts entered into after the passing of this Act, unless by the constitution of the company such exemption already exists; provided always that this section shall not apply to any contracts made by any existing company by the terms of whose deed of settlement the whole of the profits of all the business are paid exclusively to the life policy holders, and on the face of which contracts the liability of the assured distinctly appears."

1234. *Winding-up of insurance companies.*—By sect. 21, "the court may order the winding-up of any company in accordance with the Companies Act, 1862, on the application of one or more policy-holders or shareholders, upon its being proved to the satisfaction of the court that the company is insolvent." (z)

By sect. 22, "the court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such condi-

(y) By the 35 & 36 Vict., c. 41, s. 2, the foregoing part of the section is to apply to every company established before the passing of the 33 & 34 Vict., c. 61; but neither this nor that Act is to diminish the liability of the life assurance fund for any contracts entered

into before the passing of the 33 & 34 Vict. c. 61.

(z) And see the 35 & 36 Vict., c. 41, s. 4, as to the winding-up of a subsidiary company. The mode of valuing the policies in the case of a winding-up is provided for by sect. 5 of the same Act.

tions as the court thinks just, in place of making a winding-up order."

1235. *Novations by policy-holders.*—By the 35 & 36 Vict. c. 41, s. 7, it is provided that "where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy, shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

1236. *Insurance against injury by accident.*—Where an insurance company granted policies of insurance against loss of life and personal injuries arising from "accidents at sea," it was held that death by sun-stroke was not an "accident" within the meaning of the policy, and that death engendered by exposure to heat, cold, damp, and atmospheric influences could not properly be said to be accidental; (*a*) but death by drowning is a case of death by "accident" within the meaning of such a policy. (*b*) Where a policy for insuring the payment of money in case the insured should be injured by accidental violence, and die from the direct effect of such accidental injury, expressly excepts death or disability from any disease or cause

(*a*) *Sinclair v. Maritime Pass. Ass. Co.*, 30 L. J., Q. B. 77.

(*b*) *Trew v. Rail. Pass. Ass. Co.*, 6 H. & N. 839; 30 L. J., Ex. 317.

arising within the system of the insured before, or at the time of, or following such accidental injury, death from disease within the system, which disease has been caused by accidental violence, is not within the exception. (c) In consequence of the above case, the clause contained in the policies of the company was varied, and the policy does not now insure against "death from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following, such accidental injury (whether causing such death directly or jointly with such accidental injury)." Where erysipelas supervened upon, and in consequence of, an accidental cut, and the assured died of the erysipelas seven days after the accident, it was held that the insurers were protected by the above condition, and were not liable. (d)

1237. Breach of contracts of insurance—Railway accidents.—Where a passenger by railway effected an insurance for £1,000, with a company, to be paid to his personal representatives in the event of his death by a railway accident, and a proportionate part of the £1,000 to be paid to the assured himself in case of any personal injury by reason of such accident, it was held that the damages recoverable in respect of personal injury to the assured not attended with loss of life, were confined to compensation for bodily pain and suffering and the expenses of medical and surgical attendance, &c., and that loss of time or loss of profits resulting from the accident could not be taken into consideration by the jury; "otherwise one passenger, whose time is more valuable than another's, would, for precisely the same personal injury, receive a larger

(c) *Fitton v. Accidental Death Ins.* (d) *Smith v. The Accident Ins. Co.*,
 Co., 17 C. B., N. S. 122; 34 L. J., C. L. R., 5 Ex. 302.
 P. 29.

remuneration than another whose time would be of less value." (e)

1238. *Breach of covenants to insure.*—Where a covenant was entered into with an insurance company to keep up a policy in their office as security for money lent by them, and the policy was dropped, and the company recovered judgment for the amount of the loan, with interest thereon, it was held that the measure of damages was not the amount of the premiums which would have been payable to the company if the policy had been kept up, but the amount of injury sustained, either through loss of the security, or through the expenses incurred in effecting another insurance. (f) Where a deed by which a debtor assigned a policy of insurance on his life for £1,000 to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited, and the policy was subject to a condition that, if the assured should go beyond the limits of Europe without license from the directors the policy should be void, and the debtor went beyond the limits of Europe without license from the directors, it was held that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the debtor had covenanted to pay, and would have to pay, the premiums on the policy. (g) ¹

(e) *Theobald v. Railway Passengers' Ass. Co.*, 23 L. J., Ex. 249. Ex. 19. *Brown v. Price*, 4 C. B., N. S., 598.

(f) *Nat. Ass. Co. v. Best*, 27 L. J., (g) *Hawkins v. Coulthurst*, 5 B. & S. 343; 33 L. J., Q. B. 192.

¹ An "accident" policy of insurance includes in the category of "accidental injury" an accidental strain which results in death. *North American Life, &c., Ins. Co. v. Burroughs*, 69 Pa. St. 43. But a policy to cover the insured "while traveling by public or private conveyance" does not cover him while walking on foot. *Ripley v. Insurance Company*, 16 Wall. 386.

CHAPTER VI.

MERCANTILE INSTRUMENTS.

SECTION I.

BILLS, NOTES, AND CHECKS.

1239. *Bills of exchange.*—Bills of exchange are, by the custom of merchants, transferable from one person to another, so as to entitle the transferee to sue upon them in his own name. Any absolute, unconditional order (*a*) in writing from one man to another, duly stamped, directing the drawee, or person to whom the order is addressed, to pay a sum of money to the drawer or to his "order," or to some third party or to the order of such third party, and accepted by the drawee, is a bill of exchange, transferable by the payee, so as to enable the transferee to sue in his own name upon such bill, provided the assignment has been made by the payee in conformity with mercantile custom, as settled and established by law. (*b*) In order to constitute a bill of exchange it is essential that there should be a drawer, a drawee, and a payee; and, though the payee may be described in any way, yet, in order that the bill should be valid, the payee

(*a*) If the order is for the payment of money on a contingency, the instrument is not negotiable. *Alexander v. Thomas*, 16 Q. B. 333; 20 L. J., Q. B. 207. *Crouch v. Credit Foncier of England*, L. R., 8 Q. B. 374; 42 L. J., Q. B. 183. As to limitations of liabil-

ity indorsed on the face of the bill, see *Meredith, ex parte*, 32 L. J., Ch. 302.

(*b*) *Ellison v. Collingridge*, 9 C. B. 570; 19 L. J., C. P. 268. *Lloyd v. Oliver*, 21 Ib., Q. B. 307. *Peto v. Reynolds*, 9 Exch. 410.

must be a person capable of being ascertained at the time the bill is drawn. (*c*)

1240. *Transfer of bills of exchange.*—If the written order duly stamped is made payable to “bearer,” it is transferable by mere delivery; (*d*) so that any bonâ fide holder or bearer of the instrument is entitled to maintain an action upon it in his own name as soon as it becomes payable. If, on the other hand, it is drawn “payable to order,” it can only be assigned by indorsement from the payee. (*e*) The indorsement may be written either on the back or the face of the bill, (*f*) and is sometimes an indorsement in full, so-called because the indorser not only writes his own name on the bill, but expresses therein in whose favor the indorsement is made, as “pay the contents to Mr. A. B.,” and sometimes an indorsement in blank, when the name of the indorser himself alone appears upon the instrument, no mention being made of the indorsee. In the first case the indorsee can only transfer his interest in the bill by his own indorsement in writing; but, in the second, he can transfer it by delivery only, so that any subsequent bonâ fide holder may treat the first indorsement in blank as a direct indorsement to himself, and bring an action in his own name upon the instrument; and this he may do notwithstanding subsequent indorsements in full have been made thereon. (*g*)¹ Any number of persons, too, whether

(*c*) *Yates v. Nash*, 29 L. J., C. P. 306; 8 C. B., N. S., 581. *M'Call v. Taylor*, 34 L. J., C. P. 365; 19 C. B., N. S., 301.

(*d*) *Gibson v. Minet*, 1 H. Bl. 606.

(*e*) *Edge v. Bumford*, 31 Beav. 247.

(*f*) *Young v. Glover*, 3 Jur., N. S., 637.

(*g*) *Fairclough v. Pavia*, 9 Exch. 695; 23 L. J., Ex. 215. *Wookey v. Pole*, 4 B. & Ald. 9.

¹ This indorsement constitutes a distinct contract, to be governed thereafter by the law of the state where it is made. *National Bank v. Green*, 33 Iowa, 140. The indorsement of a

partners or not, may, it seems, join in suing upon a bill indorsed in blank. (*h*)

The bill may be indorsed before the day that it bears date (*i*) and before acceptance, and whilst the date and the amount for which it is drawn are left in blank ; (*k*)¹ and the acceptance and indorsement may be made before the bill is drawn ; and a bill drawn and issued in blank for the name of the payee may, under certain circumstances, be filled up by a bonâ fide holder with his own name, and will bind the drawer. (*l*) If the bill be made payable by the fraud of the acceptor to a fictitious payee, a bonâ fide holder may recover upon the instrument as a bill payable to bearer. (*m*) If the indorsement is made before the bill has been filled up for any specific sum, the indorser may become liable to subsequent indorseees or holders to any amount warranted by the stamp. The indorsement is a letter of credit for an indefinite sum. (*n*) If the payee of a bill or money order, not negotiable, indorses it, he is liable on his indorsement to his indorsee. (*o*) The indorsee may treat the indorser as

(*h*) *Attwood v. Rattenbury*, 6 Moore, 579. *Ord v. Portal*, 3 Campb. 239.

Lowe v. Copestake, 3 C. & P. 300.

(*i*) *Pasmore v. North*, 13 East, 517.

(*k*) *Snaith v. Mingay*, 1 M. & S. 87.

(*l*) *Schultz v. Astley*, 2 Bing. N. C. 544 ; 2 Sc. 815. *Crutchley v. Clar-*

ence, 2 M. & S. 90. *Crutchley v. Mann*, 5 Taunt 529.

(*m*) *Minet v. Gibson*, 3 T. R. 481 ; 1 H. Bl. 569 ; cited, 1 Campb. 130.

(*n*) *Russell v. Langstaffe*, 2 Doug. 515, *u. Hatch v. Searles*, 2 Sm. & Giff. 152.

(*o*) *Hill v. Lewis*, 1 Salk. 132.

negotiable bill after maturity is equivalent to the drawing of a new bill of exchange at sight, and the same diligence is required in making demand and giving notice as is required to change indorsers. Where an indorsement was made on April 19, and the demand and refusal on the following July 3, no explanation appearing of the delay, held that the endorsers were not liable. *Light v. Kingsbury*, 50 Mo. 331.

¹ In Ohio a blank endorser is presumed to be a guarantor. *Hoffman v. Levy*, 2 Cin. 224.

the drawer of a new bill, or as the indorser of the old bill ; but he can not treat him as both. (*p*) Every indorser may be taken as the drawer of a fresh bill inasmuch as he guarantees payment of the bill when at maturity by the acceptor. (*q*)¹

“A bill of exchange is negotiable *ad infinitum*, until it has been paid by, or discharged on behalf of, the acceptor. If the drawer has paid the bill, he may sue the acceptor upon it ; and, if, instead of suing the acceptor, he put the bill into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor.” (*r*) But, when the bill has been paid by the acceptor, or the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person can sue on it ; no person remains liable on it. If put into circulation again, it becomes a new bill, payable at sight, and must have a fresh stamp. An accommodation bill, paid by the drawer at maturity can not, therefore, be re-issued and negotiated. (*s*) A payment, however, before the bill becomes due “does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog

(*p*) *Burmester v. Hogarth*, 11 M. & W. 101.

(*q*) *Matthews v. Bloxsome*, 33 L. J., Q. B. 213. *Penny v. Innes*, 1 Cr. M. & R. 439.

(*r*) *Lord ELLENBOROUGH*, *Callow v. Lawrence*, 3 M. & S. 95. *Hubbard v. Jackson*, 4 Bing. 391.

(*s*) *Lazarus v. Cowie*, 3 Q. B. 465.

¹ Where, in an action by an indorsee against his indorser, the defendant set up that he indorsed simply to transfer his ownership, under a verbal agreement that plaintiff was to take the note as payment for certain property delivered to defendant, and that in ignorance of the law he omitted to use the words “without recourse,” held—not a good defense, as contradicting the written contract of indorsement. *Lee v. Pile*, 37 Ind. 107.

to the circulation of bills and notes ; for it would be impossible to know whether there had not been an anticipated payment of them." (*t*) If, therefore, the acceptor discounts the bill, he may re-issue it, and send it forth again into general circulation. (*u*)

1241. Restrictive indorsements.—The negotiability of the bill may be limited and restrained by the express terms of the indorsement. Hence there are restrictive, conditional, and qualified indorsements. If the payee, by special indorsement, makes a conditional transfer of the bill before acceptance, the drawee who accepts afterwards is bound by the condition. (*x*) If the indorsement is accompanied by a notification that "the within must be credited to A," or a direction "to pay A for my use," every indorsee and subsequent holder has notice of the direction, and holds the bill, or the money he receives upon it, as the trustee of the restraining party. (*y*) But an indorsement, "Pay J. S., or order, value in account with H. C. D.," is not restrictive. (*z*) And, where a bill of exchange has been indorsed in blank, and rendered generally negotiable, its negotiability can not afterwards be restrained by subsequent restrictive indorsements ; and the acceptor consequently must pay the bill on presentment by the indorsee or holder ; and, if it is not paid by the acceptor after such a presentment, the indorsers will be liable upon the instrument. (*a*) The amount to be recovered upon the bill can not be split into separate sums by the indorsement, so as to subject the prior

(*t*) *Burbridge v. Manners*, 3 Campb. 193.

(*u*) *Attenborough v. Mackenzie*, 25 L. J., Ex. 244. *Morley v. Culverwell*, 7 M. & W. 182.

(*x*) *Robertson v. Kensington*, 4 Taunt. 30.

(*y*) *Lloyd v. Sigourney*, 5 Bing. 525 ; 3 M. & P. 239. *Sigourney v. Lloyd*, 8 B. & C. 622.

(*z*) *Buckley v. Jackson*, L. R., 3 Ex. 135.

(*a*) *Walker v. Macdonald*, 2 Exch. 527 ; 17 L. J., Ex. 377.

parties to a plurality of actions. (*b*) And, if the bill be indorsed for part only of the amount, and the limitation do not appear upon the face of the indorsement, the indorsee may sue for the whole sum due upon the bill, and will be a trustee of the surplus for the indorser. (*c*)

1242. *Who is to be deemed a bonâ fide holder by indorsement.*—The first transfer, by indorsement, of a bill of exchange is not effected by the mere act of the payee's writing his name on the back of the bill. There must be a handing of the bill over, and a delivery of it to the transferee or his agent, with intent to make the person to whom it is delivered the holder of the bill, and to pass the property in it to him, and to guarantee the payment of it if the acceptor makes default (*d*) There is no indorsement, if the holder merely writes on the bill a direction to pay it to another person, and the other person gets possession of the bill without the holder's consent. Nor is there any indorsement, as between the indorser and his immediate indorsee, though the holder gives that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him the transferee of the property in the bill, (*e*) or with the intention only of making him indorsee and owner of the bill on the performance of certain terms and conditions. (*f*) Where a testator wrote his name on the back of a bill payable to his order, and kept the bill in his possession, and his executrix after his death delivered the instrument to the plaintiffs with-

(*b*) *Hawkins v. Cardy*, 1 *Ld. Raym.* 360.

(*c*) *Reid v. Furnival*, 1 *C. & M.* 538.

(*d*) *Denton v. Peters*, *L. R.*, 5 *Q. B.* 475.

(*e*) *Lloyd v. Howard*, 15 *Q. B.* 997 ;

20 *L. J.*, *Q. B.* 1. *Attenborough v. Clark*, 27 *L. J.*, *Ex.* 138.

(*f*) *Bell v. Lord Ingestre*, 12 *Q. B.* 317 ; 19 *L. J.*, *Q. B.* 71. *Castrique v. Buttigieg*, 10 *Moore, P. C.* 109.

out indorsing it, it was held that the writing of his name by the deceased, and the delivery by the executrix, would not together constitute an indorsement of the note, and that the party to whom it was delivered had consequently no right to sue upon it. (*g*) If the indorsement is intended to constitute a testamentary gift, it must be authenticated as such. (*h*)

But, if the party to whose order the bill is payable writes his name on the back of the bill, and hands it over to another, who delivers it to a third person for value, that is an indorsement from the holder to such third person, and constitutes the latter the absolute owner of the bill. Where the drawer of a bill wrote his name on the back of it, and delivered it to a party to get it discounted, and the latter pledged the bill with a pawnbroker, and appropriated the money he received on the deposit of the bill to his own use, it was held that there was a valid indorsement of the bill from the drawer to the pawnbroker. (*i*) One who receives a bill of exchange unindorsed (though for value), acquires no better title under it than that which the person from whom he receives it had. Therefore, where A had fraudulently obtained a bill from B and handed it to C, in satisfaction of a bonâ fide debt, but without indorsing it, it was held that C could not acquire a legal title to sue by obtaining A's indorsement after he had received notice of the fraud. (*k*) When the drawer or party to whose order the bill is payable has written his name on the back of the bill, and handed the bill over in the ordinary course of transfer, it is afterwards transferable, as

(*g*) *Bromage v. Lloyd*, 1 Exch. 35 ;
16 L. J., Ex. 257.

(*h*) *Mitchell v. Smith*, 33 L. J., Ch.
596.

(*i*) *Barber v. Richards*, 6 Exch. 63 ;
20 L. J., Ex. 135.

(*k*) *Whistler v. Forster*, 14 C. B., N
S., 248 ; 32 L. J., C. P. 161.

previously mentioned, from hand to hand, by mere delivery ; and the consideration for each successive transfer can not be inquired into, unless the bill has been stolen or obtained by misrepresentation or fraud. Any holder, therefore, who does not wish to sue in his own name on the bill may hand the bill over to another party, in order that the latter may sue upon it for him as his trustee. (*l*) But the bill must be handed over prior to the commencement of the action ; for, where the holder of a bill indorsed in blank, being unwilling to sue upon it himself, procured the plaintiff, who had no interest in the bill, to sue upon it, and handed the bill to the plaintiff after the commencement of the action, that the latter might produce it in court, it was held that the plaintiff was not entitled to recover upon it, as he was not the holder of the bill at the time he brought his action. (*m*) If, however, the bill has been indorsed and delivered to some person professing to act as the plaintiff's agent, although without his knowledge, and the plaintiff adopts the acts of the assumed agent, that is sufficient to entitle him to recover, although the action has been commenced in the plaintiff's name without his knowledge, and before the adoption. (*n*)

1243. *Intermediate infirmities of title.*—A bonâ fide holder for value is not affected by an intermediate fraud or infirmity of title of which he had no knowledge or cognizance at the time he advanced his money on the credit and security of the bill of which he is the holder. Therefore, if a bill of exchange, indorsed generally, and handed over by a person competent to in-

(*l*) *Oulds v. Harrison*, 10 Exch. 579.
24 L. J., Ex. 69. *Law v. Parnell*, 7
C. B., N. S., 282 ; 29 L. J., C. P. 17.

(*m*) *Emmett v. Tottenham*, 8 Exch.
884 ; 22 L. J., Ex. 281.

(*n*) *Ancona v. Marks*, 7 H. & N.
686 ; 31 L. J., Ex. 163.

dorse it, is afterwards stolen, and the thief delivers it for value to a party who receives it without notice of the theft, the latter has full authority to negotiate the bill or sue upon it. (o) Every person having possession of a bill of exchange has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer such bill, but with this limitation, that to make such transfer valid there must be a delivery, either by him or some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it or a person through whom the holder claims. (p)

1244. *When the holder is bound to prove that he gave value for the bill.*—When a bill of exchange is made payable to order, and is indorsed generally by the drawer, the indorsement is, as we have seen, tantamount to an order to pay the bill to the bearer or holder, so that the mere production of such a bill by a party in possession of it is *primâ facie* evidence that he is a *bonâ fide* indorsee and holder of the bill; but this presumption of ownership and title arising from possession may be rebutted by proof that the bill had been lost by, or improperly obtained from the owner, (q) or that the acceptance is a forgery; (r) and such evidence, if given, throws upon the holder the onus of proving that he gave value for the bill. Wherever the bill is proved to have been illegal or fraudulent in its inception, or where the immediate indorser to the plaintiff is shown to have obtained possession of it by

(o) *Peacock v. Rhodes*, 2 Doug. 634. *Raphael v. Bank of England*, 17 C. B. 173.

(p) *ALDERSON, B., Marston v. Allen*, 8 M. & W. 494; 11 L. J., Ex. 126.

Watson v. Russell, 3 B. & S. 34; 31 L. J., Q. B. 304.

(q) *Bulkeley v. Butler*, 2 B. & C. 446.

(r) *Mather v. Ld. Maidstone*, 26 L. J., C. P. 58; 1 C. B., N. S., 273.

fraud, the plaintiff may be called upon for proof that he gave value for the bill, and took it without notice of the illegality or fraud; and if such proof is not forthcoming, the plaintiff may be prevented from recovering upon the instrument. (s) Where one partner has accepted a bill in fraud of the other partners, and has applied the proceeds therefrom to his own use, the holder must show that he gave value for the bill. (t) But, if it is not distinctly proved that the note is tainted with illegality or fraud, the holder can not be called upon to show that he gave value for the bill. (u) Notwithstanding the general rule, that the onus is on the maker of a negotiable instrument to show that it has been paid, the holder is bound in the first place (unless he is a derivative indorsee for value during the currency of the bill or note) to show that the maker received value for it. (x) ¹

1245. *Fraudulent transfers and indorsements.*—

If the acceptance or indorsment has been fraudulently made, and the plaintiff is a party to the fraud, or takes the bill with full knowledge of the fraud and of the infirmity of the title of his assignor, he can not sue upon the bill, although he has given full value for it; but an innocent indorsee, who has received the bill, and given value for it, without notice of the fraud, may, it seems, transfer his title and right of action to a

(s) *Hall v. Featherstone*, 3 H. & N. 284; 27 L. J., Ex. 308. *Mather v. Lord Maidstone*, 1 C. B., N. S., 273; 26 L. J., C. P. 58. *Smith v. Braine*, 16 Q. B. 244; 20 L. J., Q. B. 201. *Berry v. Alderman*, 14 C. B. 95; 23 L. J., C. P. 34. *Harvey v. Towers*, 6 Exch. 656; 20 L. J., Ex. 318. *Pater-*

son v. Hardacre, 4 Taunt. 114.

(t) *Hogg v. Skeen*, 18 C. B., N. S., 426; 34 L. J., C. P. 153; overruling *Musgrave v. Drake*, 5 Q. B. 186.

(u) *Fitch v. Jones*, 5 Ell. & Bl. 245; 24 L. J., Q. B. 293.

(x) *Dettmar v. Metropolitan & Provincial Bank*, 1 H. & M. 641.

¹ *Wood v. Schlater*, 24 La. Ann. 284; *First National Bank v. Sturgis*, 8 Kan. 660; *Porter v. Jones*, 52 Mo. 399; *Harwood v. Knapper*, 50 Id. 456; *Bonesteel v. Bonesteel*, 30 Wis. 516.

person who has knowledge of the original fraud, but is no party thereto. The latter may purchase the title and interest of the innocent indorsee, and so obtain a right of action upon the instrument. (*y*) If a person holds the bill for a specific purpose, as for the benefit of the drawer or acceptor, and indorses the bill over in breach of the trust reposed in him, the indorsee can not, if he has notice of the trust at the time of the indorsement, acquire any better right or title to the bill than the indorser had; for by taking the bill under such circumstances he makes himself a party to a fraud. (*z*) If the holder is a mere agent, he will be affected with the infirmity of the title of his principal, and can not have a better right upon the bill than his principal has. (*a*) If a bill obtained by fraud is handed over, without indorsement, to an innocent holder for value, and the indorsement is not made until after the holder becomes cognizant of the fraud, he can not sue upon the bill. (*b*) If the party at the time of signing the bill is, without negligence on his part, misled as to the nature and contents of the document which he is signing, his signature will be of no force; for his mind does not go with the signature, and it is in the view of the law no signature at all, and a *bonâ fide* holder for value can not recover against a person who has signed under such circumstances. (*c*)

1246. Accommodation bills.—Where the bill has been accepted for the accommodation of the drawer without any consideration or value for the acceptance and that was known to the indorsee at the time he took the bill, and the indorsee paid only part of the

(*y*) *May v. Chapman*, 16 M. & W. East, 136.
 360. (*b*) *Whistler v. Forster*, 14 C. B., N
 (*z*) *Evans v. Kymer*, 1 B. & Ad. S., 255; 32 L. J., C. P. 161.
 528. (*c*) *Foster v. Mackinnon*, L. R., 4 C
 (*a*) *Solomons v. Bank of Eng.*, 13 P. 704; 38 L. J., C. P. 310.

amount for which the bill was drawn, he can only recover the sum he actually paid for the bill. (*d*) So, if part of the money due on the bill has been paid by the drawer, the holder can only recover the balance from the acceptor. (*e*)¹

1247. Indorsement of bills overdue.—Whenever the bill is due at the time of the indorsement, “it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the infirmities with which it may be incumbered ‘in his hands,’” (*f*) such as the payment or satisfaction of the bill itself to the prior holder. But the indorsee does not take it subject to claims arising out of collateral matters, such as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties. (*g*) An original absence of consideration, the acceptance being an accommodation acceptance, will not defeat the claim of an indorser for value of an overdue bill, unless there was an express or implied agreement restraining the negotiation of the bill after it should become due. (*h*) And, even if there was an agreement that the bill should not be negotiated after it was due, this will not affect a *bonâ fide* indorsee for value, who took the overdue bill without notice of the agreement. (*i*) If, pending an action on a bill of ex-

(*d*) *Wiffen v. Roberts*, 1 Esp. 259. 579. *Swan, ex parte*, L. R., 6 Eq.

(*e*) *Cook v. Lister*, 13 C. B., N. S., 358.
543; 32 L. J., C. P. 121.

(*f*) *Crossley v. Ham*, 13 East, 503.

Lloyd v. Howard, 15 Q. B. 998.

Holmes v. Kidd, 3 H. & N. 891; 28

L. J., Ex. 112.

(*g*) *Oulds v. Harrison*, 10 Exch.

(*h*) *Charles v. Marsden*, 1 Taunt.

224. *Sturtevant v. Ford*, 4 M. & Gr.

101. *Lazarus v. Cowie*, 3 Q. B. 464.

Parr v. Jewell, 16 C. B. 684.

(*i*) *Carruthers v. West*, 17 L. J., Q.

B. 4.

¹ *Howe v. Potter*, 61 Barb. 356; *Fetters v. Muncie, &c., Bank*, 34 Ind. 251.

change, the bill is transferred to an indorsee, with notice who brings a second action on the bill, that may be ground for the equitable interference of the court, but does not take away the negotiability of the instrument. (*k*)

1248. *Presentment for acceptance.*—The holder of an unaccepted bill should present it for acceptance without delay, in order that he may obtain the security of the acceptor. If acceptance is refused, the antecedent parties become liable immediately. Twenty-four hours at least ought to be allowed to the drawee to determine whether he will accept or not, if he requires time for consideration ; but, if he avows his determination not to accept, the holder may forthwith proceed against the antecedent parties ; and if the acceptor clogs his acceptance with conditions and qualifications, the holder may treat his qualified acceptance as a refusal to accept, and give notice of dishonor. If he accepts the qualified acceptance, he must give notice of the nature of the acceptance to the prior parties. (*l*) When the bill is payable a certain number of days after sight, it is to be accounted so many days after the bill shall be accepted or protested for non-acceptance. (*m*) The days are reckoned exclusively of the day on which the bill is accepted, and inclusively of the day on which it falls due. (*n*) If no time at all is stated upon the face of the bill, (*o*) or if it is payable at sight or on presentation, (*p*) the instrument will be payable on demand.

1249. *Proof of the acceptance.*—By the 19 & 20

(*k*) *Deuters v. Townsend*, 5 B. & S. 613 ; 33 L. J., Q. B. 301.

(*l*) *Rowe v. Young*, 2 B. & B. 240.

(*m*) *Campbell v. French*, 6 T. R. 212.

(*n*) *Coleman v. Sayer*, 1 Barnard, 303. *Bellasis v. Hester*, 1 Ld. Raym.

281. *Byles*, 134.

(*o*) *Abbott v. Douglas*, 1 C. B. 491

(*p*) 34 & 35 Vict. c. 74.

Vict. c. 97, s. 6, it is enacted, that no acceptance of any bill of exchange, whether inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

(*q*) The acceptance is usually made by the drawee's writing across the bill the word "accepted," and signing his name thereto. Formerly, if the drawee merely wrote his name upon the face of the bill, without the word "accepted," or if he wrote "accepted," "presented," or any direction to pay addressed to a third party, or merely put his mark upon the bill, or promised in writing to accept or pay the bill, this was evidence for a jury of an acceptance of the instrument by him; (*r*) and so was a letter from his solicitor after action, admitting the signature to be in his handwriting. (*s*) If he name of the acceptor is written upon the bill by a third party, and the latter places his mark against the name as adopting such signature, there is a sufficient acceptance of the instrument. (*t*) If the drawee after he has put his name to the bill, and before he has parted with the possession of it, changes his mind, and runs his pen through the signature, the acceptance is canceled, and he can not be made liable upon the bill. (*u*)

1250. *Fictitious indorsee.*—If the acceptor has authorized the drawing and indorsement of the instrument in a particular form, or in the names of fictitious persons, he can not afterwards object to such drawing or indorsement. (*v*)

(*q*) *Fentum v. Pocock*, 5 Taunt. 196.

(*r*) *Powell v. Monnier*, 1 Atk. 612; Bull. N. P. 270. *Wynne v. Raikes*, 5 East, 514. *Grant v. Hunt*, 1 C. B. 59.

(*s*) *Chaplin v. Levy*, 9 Exch. 531.

(*t*) *George v. Surrey*, 1 M. & M. 516.

(*u*) *Cox v. Troy*, 5 B. & Ald. 474.

(*v*) *Ashpitel v. Bryan*, 5 B. & S. 723; 32 L. J., Q. B. 91; 33 Ib. 328.

1251. *Liability of the acceptor—Failure of consideration.*—As between the acceptor and the drawer of a bill, failure of consideration is an answer to an action for the amount of the bill, so that if a person purchases a bill payable at the end of three months for goods or money to be delivered to the acceptor at the end of one month, and the goods or the money are not delivered, the acceptor is not liable upon the bill, unless it was indorsed before it became due to a bonâ fide holder for value. (x) When the bill has been negotiated the acceptor is bound to pay the bill at maturity, and to find out the holder for that purpose. He is not entitled to any presentment or formal demand of payment; and a request in the shape of the issue of a writ is the only request that need be made him by the indorsee, although the bill be made payable on demand. (y) A person who has accepted a bill of exchange can not escape from liability to a bonâ fide indorsee by setting up a forgery of the name of the drawer. (z) “The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and his discharge pro tanto in his account with the drawer, and to one who should refuse or be unable to deliver up the bill, the acceptor is not bound (without an indemnity, *post*) to pay the sum therein specified.” (a)

An acceptance of a bill of exchange can only be made by the party to whom the bill is addressed, or for his honor. An acceptance by any other person is not an acceptance within the usage and custom of merchants. Thus, where one John Hart drew a bill

(x) Astley v. Johnson, 5 H. & N. 141; 29 L. J., Ex. 161. Puget de Bras v. Forbes, 1 Esp. 117.

(y) Rumball v. Ball, 10 Mod. 38.

(z) Mather v. Maidstone, 18 C. B. 295; 25 L. J., C. P. 311.

(a) Ramuz v. Crowe, 1 Exch. 173.

payable to himself or order, and addressed it to himself, "John Hart," and across the face of the instrument was written, "Accepted, H. J. Clarke," it was held that Clarke could not be sued as acceptor of a bill of exchange directed to him. Such a bill so accepted would appear to be a promissory note, made by the acceptor, to pay the sum mentioned therein to the drawer or his order. (*b*) But, if the party to whom the bill is addressed writes his acceptance upon it in a name totally different from his own name, he will be liable upon the instrument, as he may accept it in any name he thinks fit to adopt. (*c*) Persons may, as we have before seen, draw, accept, or indorse bills in assumed or adopted names, and render themselves responsible upon the instrument by so doing; (*d*) but, if the name of a party appearing on the face of a bill as drawer or indorser has been placed there without his authority, he can not, of course, be made responsible upon the instrument, but the indorsee or holder must proceed against his own immediate indorsee, or the party from whom he got the bill. If the name of a party is mis-spelled, oral evidence is admissible to show who was intended. (*e*) The acceptor can not set up, as a defense to an action by an indorsee, that the drawer and first indorser was an uncertificated bankrupt at the time the acceptance was given. If he credits the bill of a bankrupt he is responsible to every bonâ fide holder. (*f*)

1252. *Liability of the drawer and indorser.*—Every person who draws or indorses a bill of exchange

(*b*) *Davis v. Clarke*, 6 Q. B. 19.
Fielder v. Marshall, 30 L. J., C. P.
 158.

(*c*) *Lindus v. Bradwell*, 17 L. J., C.
 P. 123.

(*d*) *Jenkins v. Morris*, 16 M. & W.
 881.

(*e*) *Willis v. Barrett*, 2 Stark. 29.

(*f*) *Braithwaite v. Gardiner*, 8 Q.
 B. 473. *Hallifax v. Lyle*, 3 Exch.
 453.

impliedly enters into a conditional contract to pay the amount of the bill to the payee or his assignee, if the acceptor does not pay the amount, unless he indorsed as agent for the plaintiff for the accommodation of the latter, and without value. (*g*) When a bill is dishonored, it is generally thrown back upon the first indorser, each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser, till it at last arrives at the first indorser. They may arrange the matter amongst themselves; and any one indorser may sue the acceptor or drawer instead of any one of the preceding indorsers, striking out all the names upon the bill below his own. (*h*) But, as the liability of the drawer and indorsers is a secondary and conditional liability, accruing only in default of payment by the acceptor, there must be proof of a regular presentment of the bill to the latter after it became due, and non-payment of the amount, termed a dishonor of the bill, and notice of such presentment and dishonor to the drawer or indorser, before the absolute liability of the latter upon the instrument can attach. Where the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was guilty of no negligence in so signing it, it was held that he was not liable to a *bonâ fide* holder for value. (*i*)

1253. *Giving time for payment.*—The parties

(*g*) *Castrique v. Buttigieg*, 10 Moore, P. 658.
P. C. 109.

(*i*) *Foster v. Mackinnon*, L. R., 4

(*h*) *Walwyn v. St. Quintin*, 1 B. & C. P. 704; 38 L. J., C. P. 310.

whose names appear upon the face of the bill are liable as principals and sureties, in the order in which they stand ; and the rule prevailing that a release or discharge, or time given for payment to the principal, operates as a release or discharge to the surety, is applicable to such instruments. By giving time, therefore, to the acceptor, the drawer and indorsers will be discharged. (*k*) But a binding agreement with a person who is no party to the bill, to give time to the acceptor, without the consent of the drawer, does not discharge the drawer. (*l*) As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties : but, as between the holder and the drawer, the drawer is the principal debtor, and the indorsers are his sureties ; and, as between the holder and second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties, but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals. (*m*)

1254. *Presentment for payment.*—There is a sufficient presentment of the bill for payment, if payment has been demanded of the wife, clerk, or other agent of the drawee or acceptor at his residence, or at his customary place of business. If the drawee be dead, the presentment must be made to his personal representatives, and, if he have none, then at his last place of residence. When it is made at the place of business

(*k*) *English v. Darley*, 2 B. & P. 61. *Moss v. Hall*, 5 Exch. 49 ; 19 L. J. Ex. 205. *Davies v. Stainbank*, 6 De G., M. & G. 679. *Greenough v. M'Clelland*, 2 El. & El. 424. *Lawrence v. Walmsley*, 12 C. B., N. S., 799 ; 31 L. J., C. P. 143. *Ante.*
 (*l*) *Frazer v. Jordan*, 8 Ell. & Bl. 308 ; 26 L. J., Q. B. 288.
 (*m*) *Byles*, 179. *Ante.*

of the acceptor, it should be made during the usual hours of business; (*n*) and, when it is made at his place of residence, it should be made at a period of the day or evening when he may reasonably be expected to be found there. (*o*) "The holder is to present promptly, and to communicate without delay notice of non-payment or of the insolvency of the acceptor; for a party is not only entitled to knowledge of insolvency, but to notice that, in consequence of such insolvency, he will be called upon to pay the amount of the bill." (*p*) If the acceptance is a conditional acceptance, the condition must be strictly accomplished; but the holder is not bound to present the bill the very day that it becomes due, unless the condition is express to that effect. (*q*) If the bill is accepted payable at a particular place, it is not necessary, in order to charge the acceptor upon the bill, that it should be presented for payment at that place, unless the acceptor expressly specifies on the face of the bill that it will be paid there and nowhere else. But the drawer can not be charged upon a bill made payable by him at a place indicated, unless the bill has been presented at that place. If the acceptor accepts, payable at a banker's, he undertakes (1 & 2 Geo. 4, c. 78) to pay the bill at maturity, when presented for payment either to himself or at the banker's; if he accepts payable at a banker's, and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise. (*r*) The statute is confined to the case of acceptors, and does

(*n*) *Elford v. Teed*, 1 M. & S. 28.
Whitaker v. Bank of England, 1 C.
 M. & R. 744.

(*o*) *Wilkins v. Jadis* 2 B. & Ad.
 188.

(*p*) *Camidge v. Allenby*, 6 B. & C.
 383.

(*q*) *Smith v. Vertue*, 30 L. J., C. P. 56.

(*r*) *Halstead v. Skelton*, 5 Q. B. 93

not alter the liability of drawers of bills of exchange. Therefore, if the drawer has directed, by the body of the bill, that the amount he draws for shall be paid at a particular place, the bill must be presented at that place before he (the drawer) can be made responsible for non-payment. (*s*) If the banker at whose bank the bill is payable is the holder of the bill at the time of its maturity, there is a sufficient presentment. If the bill is made payable at a particular town, and the holder goes there with the bill, and makes inquiry for the party to whom it is to be presented, and the latter is not to be found, this is a sufficient presentment at the place indicated. (*t*) If the bill is made payable at a particular house, presentment to any inmate will suffice; (*u*) or, if the house be shut up, at the house door; (*x*) and, if two places be named, the holder has the option to present it at either. (*y*) "A presentment according to the directions of a forged acceptance can not be a good presentment as against the drawer." (*z*) The mention of the names and address of the London agents in a memorandum at the foot of a country banker's cheque does not make the cheque payable at the place so indicated; and non-payment there on presentment is not necessarily a dishonor. (*a*)

1255. *Non-presentment, when excused.*—If the acceptor absconds, or shuts up his house and can not be found, presentment is excused, because it can not be made, and the bill may be treated as a dishonored bill; but, if the acceptor has merely removed to a dif-

(*s*) *Gibb v. Mather*, 1 M. & Sc. 387.

Saul v. Jones, 28 L. J., Q. B. 37.

(*t*) *Hardy v. Woodroffe*, 2 Stark. 319.

(*u*) *Buxton v. Jones*, 1 M. & Gr. 83.

(*x*) *Hine v. Allely*, 4 B. & Ad. 624.

(*y*) *Beeching v. Gower*, Holt, N. P. 314.

(*z*) *Wetton v. Hodd*, 18 Jur. 630.

(*a*) *Bailey v. Bodenham*, 16 C. B. N. S., 288; 33 L. J., C. P. 252.

ferent residence, and can be discovered, the bill must be presented in the regular way. (*b*) Neither the bankruptcy of the drawee or acceptor, nor a declaration by him that he will not pay the bill, is of itself an excuse for an omission to present for payment; (*c*) but, if a banking firm in partnership has notoriously stopped payment and shut up its ordinary place of business, and immediate notice of the insolvency of the firm is given by the holder to the other parties, he will be entitled to recover upon the bill, although there has been no formal presentment. (*d*) If the bill is a mere accommodation bill, and the acceptor had no effects of the drawer's in his hands during any portion of the period that the bill had to run, and the drawer could have had no reasonable expectation that the bill would be honored by the acceptor, presentment to the latter is excused as against the drawer, as the latter can not have been prejudiced by the want of presentment: for, "if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill." (*e*) "But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He (the indorser) is in the nature of a surety or guarantee of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawer and drawee." (*f*) His liability, therefore, upon the bill does not arise until presentment has been duly made, and he has received notice of dishonor.

(*b*) *Collins v. Butler*, 2 Str. 1087.

L. R., 6 Eq. 368; *Ib.*, 1 Ch. 18; 38 L.

(*c*) *Sands v. Clarke*, 8 C. B. 759; 19

J., Ch. 121.

L. J., C. P. 87.

(*d*) *Turner v. Stones*, 1 D. & L. 122.

(*e*) *Terry v. Parker*, 6 Ad. & E. 507.

Robson v. Oliver, 16 L. J., Q. B. 437.

East of England Banking Co., in re,

(*f*) *Carter v. Flower*, 16 L. J., Ex. 202.

1256. *Days of grace* are so called because they were formerly allowed the drawee as a favor; but the laws of commercial countries have long since recognized them as a right. The number of these days varies in different places. The three days of grace allowed in this country are reckoned exclusive of the day on which the bills fall due, and inclusive of the last day of grace. Where there are no days of grace and the bill falls due on a Sunday, Christmas Day, Good Friday, public fast, or thanksgiving day, or where the last of the days of grace happens on such a day, the bill becomes payable on the day preceding, and if not then paid must be treated as dishonored. If the last day is one of the public holidays established by the 34 Vict. c. 17, the bill is payable on the day following. (*g*) Presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties. (*h*) By the Bills of Exchange Act, 1871, (*i*) after reciting that doubts had arisen whether a bill payable at sight or on presentation was payable until the expiration of a certain number of days of grace, it is enacted (sect. 2) that every bill of exchange or promissory note drawn after that act came into operation, (*k*) and purporting to be payable at sight or on presentation, shall bear the same stamp as, and shall for all purposes whatsoever be deemed to be, a bill of exchange or promissory note payable on demand.

1257. *Notice of dishonor.*—If the bill has been duly presented to the acceptor, and the days of grace have elapsed, and the bill remains unpaid, the holder should give prompt notice of the dishonor of the bill

(*g*) 34 Vict. c. 17.

(*i*) 34 & 35 Vict. c. 74.

(*h*) Byles, 5th ed. 150, 151. Tassell

(*k*) Aug. 14th, 1871.

v. Lewis, 1 Ld. Raym. 743.

to all the other parties to the instrument against whom he intends to proceed. (*l*) Each indorser is entitled to notice, but not the drawee or acceptor to whom the bill has been presented for payment. The notice should be given by the holder, and by each party who intends to sue on the bill, within one day, or, at the latest, twenty-four hours after he has received information of the dishonor of the bill, if the residences or places of business of the parties can be discovered with due and reasonable diligence. (*m*) But this rule applies only as between the parties to a bill, and does not give a day for communication between the agent of the holder of a bill and such holder who resides at a distance. (*n*) A plaintiff in an action on the bill need not himself have given all the notices; he may avail himself of a notice duly given by any other party to the bill. (*o*) When the bill becomes payable on the Sunday, Good Friday, or Christmas Day, the notice need not be given until the day after. (*p*) Where a bill of exchange was indorsed to a branch bank of a London banking-house, who sent it to another branch of the same bank, who indorsed it to the head establishment in London, it was held that each of the branch banks was to be considered an independent indorsee or holder, and each entitled to the usual notice of dishonor. (*q*) Any agent in possession of the bill may give the notice; and it need not state at whose request it was given, nor who was the owner of the bill. Any persons also who pay the bill

(*l*) *Maltass v. Siddle*, 6 C. B., N. S., J., Q. B. 232.
 501; 28 L. J., C. P. 257. (*o*) *Jervis, C. J., Rowe v. Tipper*, 13
 C. B. 256; 22 L. J., C. P. 135.
 (*m*) *Gladwell v. Turner*, L. R., 5 Ex. 59; 39 L. J., Ex. 31. (*p*) 7 & 8 Geo. 4, c. 15; 6 & 7 Will
 4, c. 58, s. 2.
 (*n*) *Leeds Banking Co., in re*, L. R., 1 Eq. 1; 35 L. J., Ch. 33. (*q*) *Clode v. Bayley*, 12 M. & W
v. Criddle, L. R., 4 Q. B. 460; 38 L. 51.

for the honor of a party thereto become on payment holders as upon a transfer from the person for whom they made the payment, and are entitled to avail themselves of a notice of dishonor given by any of the parties to the bill. (r)

1258. *What amounts to notice of dishonor.*—A mere demand of payment of a bill does not amount to notice of dishonor; (s) ¹ but an intimation that the bill has not been paid by the acceptor, or that it has not been paid in regular course, accompanied or unaccompanied by a demand of payment, will be sufficient. (t) A mistake in the name of the person on whose behalf the notice is given will not avoid the notice, but will place the party giving it in the same situation as to the party to whom it is given as if the representation had been true, so that the defendant will have every defense against the plaintiff that he would have had if the notice had been really given by the party named. (u) A misdescription, also, of the bill, not misleading the party receiving the notice, will not vitiate such notice. (x) If the bill had really been

(r) *Goodall v. Polhill*, 1 C. B. 242.

Ex. 143.

(s) *Solatte v. Palmer*, 7 Bing. 530;
2 Cl. & F. 97. *Strange v. Price*, 10
Ad. & E. 125. *Leeds Banking Co.*,
in re, supra.

(u) *PARKE, B., Harrison v. Ruscoe*
15 M. & W. 236; 15 L. J., Ex. 110.

(x) *Bromage v. Vaughan*, 16 L. J.,
Q. B. 10. *Rowlands v. Springett*, 14

(t) *Bailey v. Porter*, 14 M. & W. 44.
Paul v. Joel, 4 H. & N. 355; 28 L. J.,

M. & W. 7. *Mellersh v. Rippen*, 21
L. J., Ex. 222.

¹ Unless the words "presentation and protest waived," or their equivalent, are contained in the body of the bill. In such case the waiver affects and forms part of the contract of the indorser as well as the drawer, and is binding upon him according to the tenor and legal effect of the bill. *Bryant v. Merchants' Bank*, 8 Bush, 39. And see as to what may constitute, *Pier v. Heinrichoffer*, 52 Mo. 333; *Grant v. Spencer*, 1 Mon. 136; *Hunter v. Hook*, 64 Barb. 469; *Heman v. French*, 2 Cin. 561.

dishonored at the time the notice is given, but the party giving the notice was not himself certain of the fact at the time he gave the notice, it is no objection to the notice. (*y*) The notice may be either written or verbal. Any form of words conveying information to the mind of the party to whom it is addressed, that the bill has been presented and dishonored, given to the party, or left at his usual place of business during business hours, or at his private residence, is sufficient. (*z*) If the house is shut up, and the party sent to give notice puts a written notice through or under the door, that will suffice. (*a*)

1259. Posting the notice.—The notice of dishonor should, if possible, be communicated by the next post, if a post leaves within a few hours after information of the dishonor of the bill. (*b*) If the letter, by the mistake of the postmaster, does not reach its destination, the party who posts it will not suffer; he does all that is usual and necessary, and does not guarantee the correctness of the post-office delivery. (*c*) But the letter, when sent by post, must of course be properly directed; and, when it is sent to a large town, the street and number of the house in which the party to whom the notice is given resides, should be stated, (*d*) unless the latter is the drawer of the bill, and

(*y*) *Jennings v. Roberts*, 24 L. J., Q. B. 104.

(*z*) *Phillips v. Gould*, 8 C. & P. 355. *Hartley v. Case*, 4 B. & C. 341; 6 D. & R. 505. *Lewis v. Gompertz*, 6 M. & W. 403. *East v. Smith*, 16 L. J., Q. B. 295. *Carter v. Flower*, 1b. Ex. 201. *Chard v. Fox*, 14 Q. B. 201. *Everard v. Watson*, 22 L. J., Q. B. 222. *Caunt v. Thompson*, 7 C. B. 411; 18 L. J., C. P. 128. *Metcalf v.*

Richardson, 11 C. B. 1011. *Maxwell v. Brain*, 10 Jur., N. S., 777.

(*a*) *Allen v. Edmundson*, 2 Exch. 723. *Housego v. Cowne*, 2 M. & W. 348.

(*b*) *Darbishire v. Parker*, 6 East, 8.

(*c*) *PARKE, B.*, *Woodcock v. Houldsworth*, 16 L. J., Ex. 49; 16 M. & W. 124.

(*d*) *Walter v. Haynes*, R. & M 149.

states his address in an equally general manner. (e)¹ An action is maintainable immediately after the notice has been received by the party to whom it is addressed ; and it is sufficient for the plaintiff to show that the defendant must have received it according to the usual routine of the post-office delivery prior to the issuing of the writ. (f)

1260. Foreign bill—Protest—Noting—When a foreign bill is refused acceptance or payment, the dishonor must be announced by a protest, which should be made by a notary public, or, if there be none, by an inhabitant of the place where the bill is payable, in the presence of two witnesses. (g) The protest simply announces the presentment and non-acceptance or non-payment of the bill. Noting is a minute made on the bill by the officer at the time of the refusal to accept, and is the preparatory step to protest. Notice of protest and of the dishonor of a foreign bill should always be sent by the first available opportunity. (h) If a foreign bill is taken up and paid for honor, the payment must be preceded or accompanied by a declaration, made in the presence of a notary, for whose honor the party pays the bill, which should be recorded by the notary either on the protest or in a separate instrument. (i) A bill of exchange payable in France, though drawn in England, is a foreign bill ;

(e) *Clarke v. Sharpe*, 3 M. & W. 166.
Burmester v. Barron, 17 Q. B. 828.

(h) *Muilman v. D'Eguino*, 2 H. Bl. 565.

(f) *Castrique v. Bernabo*, 6 Q. B. 498.

(i) *Geralopulo v. Wieler*, 10 C. B. 719.

(g) *Byles*, 5th ed., 189.

¹ A notary public is required to give or send the notices of the dishonor of commercial paper protested by him, to the parties sought to be held liable, when he knows their place of residence, and not in cases in which it might be in his power to ascertain this fact by the use of reasonable diligence. *Mulholland v. Samuels*, 8 Bush, 63.

and notice of dishonor according to French law is sufficient. (*k*)

1261. *Proof of notice of dishonor.*—A promise by the defendant, after the bill becomes due, to pay the amount thereof, or a part payment, or the offer of it, or an admission by the defendant of his liability upon the bill, is evidence that notice of dishonor was duly given, (*l*) or that without such notice the defendant is the proper person to pay the bill. (*m*) A promise, after the bill is due, to pay the holder the amount of the bill, operates as “an admission on the part of the defendant that the holder had a right to resort to him upon the bill;” and, “if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest or want of notice, it is a question of fact whether he does not thereby admit that all the steps that are essential to create liability in him have been duly taken.” (*n*) If the defendant has suffered judgment by default in a prior action against him on the same bill, this is an admission by him of his liability upon the instrument, so as to dispense with proof of notice of dishonor (*o*).

1262. *Dispensation of notice.*—Notice of the dishonor of the bill may be dispensed with and excused by the conduct and declaration of the party otherwise entitled to it. If the party to whom the notice is to be given absents himself from his place of business, and the holder goes or sends there, and finds no one to receive the notice, this is equivalent to a dispensa-

(*k*) *Hirschfield v. Smith*, L. R., 1 C. P. 340; 35 L. J., C. P. 177.

(*l*) *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229; 5 Sc. 598. *Brownell v. Bonney*, 1 Q. B. 39. *Jackson v. Collins*, 17 L. J., Q. B. 142.

(*m*) *Potter v. Rayworth*, 13 East 418.

(*n*) *Campbell v. Webster*, 2 C. B. 265.

(*o*) *Rabey v. Gilbert*, 6 H. & N. 526 30 L. J., Ex. 170.

tion of notice, since, according to the usage of merchants, a man who puts his name to a bill ought to be ready at his place of business to receive notice of dishonor. (*p*) Where the drawer stated to the holder of the bill, a few days before the bill became due, that he had no regular residence to which notice could be sent, and that he would himself call upon the acceptor and see if the bill was paid, it was held that he had thereby expressly dispensed with notice of dishonor from the holder. (*q*) It has been also held that notice of dishonor to the drawer had been dispensed with or waived in the following cases:—where the drawer had himself countermanded the payment of the bill; (*r*) where he stated, the day before a bill became due, that it would not be paid, and that it was not worth while to trouble him with a post letter to give him notice; (*s*) where his residence was unknown, and the holder could not, by the exercise of reasonable diligence and inquiry, discover it; (*t*) where he had made the bill payable at his own house; (*u*) where he had no effects at any time in the hands of the acceptor, and would have no remedy against the acceptor or any other person in consequence of his being obliged to pay the bill; (*x*) where he had not sufficient effects in the hands of the acceptor at the time when he would reasonably expect the bill to be presented for payment, and no reasonable expectation that it would be paid; (*y*) where, although goods had been sold by him to the drawee, yet a long period of credit had

(*p*) *Allen v. Edmundson*, 17 L. J., Ex. 291; 2 Exch. 723.

(*q*) *Phipson v. Kneller*, 4 Campb. 285.

(*r*) *Hill v. Heap, D. & R., N. P. C.* 57.

(*s*) *Burgh v. Legge*, 5 M. & W. 421.

(*t*) *Bateman v. Joseph*, 2 Campb. 461. *Berridge v. Fitzgerald*, L. R., 4

Q. B. 639; 38 L. J., Q. B. 335.

(*u*) *Sharp v. Bailey*, 9 B. & C. 45.

(*x*) *Cory v. Scott*, 3 B. & Ald. 622. *Thomas v. Fenton*, 5 D. & L. 39.

(*y*) *Carew v. Duckworth*, L. R. 4 Ex. 313; 38 L. J., Ex. 149.

been given, and he had drawn the bill without any reasonable expectation that it would be accepted or paid. (z) And a waiver of notice of dishonor may be inferred from a subsequent promise to pay, or any admission of liability on the bill, by the party entitled to notice. (a)¹

If the drawer draws on a person who is not his debtor, nor has received any value for the bill, the bill must be considered *prima facie* an accommodation bill. In such a case, the drawer is himself the person who ought to provide funds and pay the bill; and he is not, consequently, entitled to notice of dishonor. But the state of the accounts as between the drawer and drawee does not in anywise do away with the necessity of notice of dishonor to the indorser. When the action is brought against the latter, "it is not enough, even *prima facie*, to dispense with notice, simply to state that he had indorsed without value, or had no effects in the hands of prior parties." And an allegation that no damage was sustained by him from want of notice is clearly insufficient. The indorsee stands, as we have seen, upon a different footing from the drawer. If he has indorsed to the holder without value or effects in the hands of prior parties, it does not follow that he is not entitled to notice; for he may have indorsed for the accommodation of others, when he will have a right to notice, because on payment he may recover against those persons. (b) The bankruptcy of the drawee or acceptor, however notor-

(z) *Claridge v. Dalton*, 4 M. & S. 231. *Rabey v. Gilbert*, 6 H. & N. 536; 30 L. J., Ex. 170.

(a) *Woods v. Dean*, 3 B. & S. 101. (b) *Carter v. Flower*, 16 L. J., Ex 32 L. J., Q. B. 1. *Cordery v. Colville*, 199; 16 M. & W. 743. *Maltass v Siddle*, 28 L. J., C. P. 257; 6 C. B. 1b., C. P. 210; 14 C. B., N. S., 374. N. S., 501.

¹ See *ante*.

ious, constitutes no excuse for an omission to give notice of dishonor; and the knowledge of the bankruptcy by the party entitled to notice is not equivalent to notice. (*c*)

1263. *Transfer by delivery without indorsement.*—A transfer by mere delivery without indorsement does not, as we have before seen, render the transferor liable to the transferee upon the bill itself, although he may, under certain circumstances, become liable to refund the money he received in exchange for the bill, if the bill is dishonored at maturity and turns out to be a mere piece of waste paper. If a man goes into the money market with a bill of exchange, and gets it discounted without putting his name upon the back of it, and, in effect, sells the bill for what he can get for it, he is not responsible for the repayment of the money he received in exchange for it, if the parties to the bill turn out to be insolvent and the bill becomes worthless, unless he knew of the insolvency and the consequent worthlessness of the bill at the time he offered it for sale in the market. (*d*) But, if the bill is a forgery, and is not what it purports upon the face of it to be, the transferor is bound to refund the money he received by way of discount on the bill, as the transferee has not got what was agreed to be transferred to him in exchange for his money, and there is consequently a total failure of the consideration for the money. (*e*)

1264. *Bills taken up supra protest*—A person who takes up a bill supra protest for the benefit of a particular party to the bill succeeds to the title of the

(*c*) *Esdaile v. Sowerby*, 11 East, 114. *Ex parte Shuttleworth*, 3 Ves. 368.
Fyddell v. Clark, 1 Esp. 447.

(*d*) *Fenn v. Harrison*, 3 T. R. 579. (*e*) *Gurney v. Womersley*, 4 Ell. & Bl. 133; 24 L. J., Q. B. 47.

party from whom, not for whom, he receives it, and has all the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honor he takes it up, and that he can not himself indorse it over. (*f*)

1265. *Retiring of bills by acceptors and indorsers*—"If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid; but, if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had had he been called upon in due course, and had paid the amount to his immediate indorsee." (*g*)

1266. *Payment and satisfaction of a bill of exchange as between a drawer or indorser and an indorsee, whether before or after the bill becomes due, does not enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee, (*h*) unless the bill is an accommodation bill. (*i*)* Satisfaction should always be made to the holder and proprietor of the bill; and payment to any other party will not discharge the acceptor, unless the money reaches the holder, and the latter treats it as received in liquidation of the bill. Payment to the holder is good, although the latter may have stolen the bill, or become wrongfully possessed of it, provided the payment be *bonâ fide* in the usual course of business. (*k*)

1267. *Promissory notes.*—By the 3 & 4 Anne, c.

(*f*) *Swan, ex parte*, L. R., 6 Eq. 344.

(*g*) *JERVIS, C. J., Elsam v. Denny*, 15 C. B. 94; 23 L. J., C. P. 192. *Woodward v. Pell*, L. R., 4 Q. B. 55.

(*h*) *Jones v. Broadhurst*, 9 C. B. 173. *Randall v. Moon*, 12 C. B. 261.

(*i*) *Cook v. Lister*, 32 L. J., C. P. 121; 13 C. B., N. S., 543.

(*k*) *Williams v. James*, 15 Q. B. 498.

9, and the 7 Anne, c. 25, s. 3, it is enacted, that all notes in writing made and signed by any person, body politick or corporate, or by the servant or agent of any corporation, banker or trader, usually intrusted to sign promissory notes, whereby such person, body politick, &c., shall promise to pay to any other person or persons, &c., his or their order, or unto bearer, any sum of money mentioned in such note, shall be assignable or indorsable over in the same manner as inland bills of exchange. Any order or promise in writing, therefore, for the payment of a certain or definite sum of money absolutely and unconditionally to a person therein named, or "to his order," or "to bearer," duly stamped, will constitute a negotiable promissory note. (*l*) A promise also in writing to pay a sum of money to bearer, without mentioning any particular person by name, or a promise to pay to a fictitious person or bearer, is a negotiable note within the statute. (*m*) A promise to pay "to A, B, and C, or to their order, or the major part of them, £100," is a promissory note. (*n*) If it appears doubtful whether the instrument was intended to be a bill or a note, it may be treated either as the one or the other, at the election of the payee. (*o*) An instrument in the form of a bill of exchange addressed to no one, but accepted by the defendant, may be treated as a promissory note. (*p*) But, if it is a mere inchoate instrument, having neither the name of a drawer nor of a payee upon it, it is wholly nugatory. (*q*) A promissory note need not contain an express promise in

(*l*) *Jury v. Barker*, Ell. Bl. & Ell. 459; 27 L. J., Q. B. 255.

(*m*) *Grant v. Vaughan*, 3 Burr. 1527.

(*n*) *Watson v. Evans*, 1 H. & C. 662; 32 L. J., Ex. 137.

(*o*) *Edis v. Bury*, 6 B. & C. 435.

(*p*) *Peto v. Reynolds*, 9 Exch. 415; 23 L. J., Ex. 98. *Fielder v. Marshall*, 9 C. B., N. S., 606; 30 L. J., C. P. 158.

(*q*) *M'Call v. Taylor*, *ante*.

terms upon the face of it ; it is sufficient if the promise appears by necessary inference from the words used.

(*r*) A note in writing, for example, to the following effect, " I promise to account with A B, or order, for £50 value received by me," has been held a promissory note negotiable within the statute of Anne. (*s*) And its negotiability is not destroyed by an acknowledgment upon the face of it of a deposit of title-deeds as a collateral security for the payment of the money (*t*) But it must in all cases, like bills of exchange, be drawn or made for the payment of money by some certain person absolutely and unconditionally. If the promise is in the alternative to pay if somebody else does not, (*u*) or if the payment is to depend upon a contingency or the happening of any uncertain event, or if it is to be made out of a particular fund which may or may not be available, the instrument is not negotiable, and can not be transferred by indorsement or in any other manner. (*x*) Any words, indeed, upon the face of the note qualifying the promise, and rendering the ultimate liability to pay the money uncertain, will deprive the note of negotiability, and render it a mere agreement. (*y*)

A promise to pay " as per memorandum of agreement " is not a qualified or conditional promise ; (*z*) nor is a promissory note payable by installments, subject to a condition that, on default being made in payment of the first installment, the whole amount should become immediately payable, a note payable upon a

(*r*) *Miller v. Thompson*, 4 Sc. N. R. 204.

(*s*) *Morris v. Lee*, 2 Ld. Raym. 1396; 1 Str. 29; 8 Mod. 362.

(*t*) *Wise v. Charlton*, 4 Ad. & E. 786.

(*u*) *Ferris v. Bond*, 4 B. & Ald. 679.

(*x*) *Blackenhagen v. Blundell*, 2 B. & A. 417. *Hill v. Halford*, 2 B. & P. 413.

(*y*) *Robins v. May* 11 Ad. & E. 213. *Clarke v. Percival*, 2 B. & Ad. 660.

(*z*) *Jury v. Barker*, *ante*.

contingency, but is, if made payable to order, assignable and indorsable under the statute of Anne. (*a*) But it is essential in all cases to the negotiability of a bill or note, that it be drawn payable "to bearer" or "to order." (*b*) If those words are omitted, the instrument is not transferable, and the action upon it must be brought in the name of the original promisee or payee. But, if the words "or order" or "or bearer" have been omitted by mistake, they may, after the bill or note has been signed, be inserted with the consent of all parties in pursuance of an original intention to make the instrument negotiable. (*c*) If, also, the person to whom, or to whose order, the money is to be paid, is uncertain, the instrument is not a promissory note, unless it can be treated as payable to bearer. A promise "to pay the secretary for the time being" of an insurance company, being a "floating contingent promise" to pay some person to be ascertained *ex post facto*, is not a negotiable promissory note payable to bearer. (*d*) But a promise to pay to "the trustees of Wesleyan Chapel, Harrogate, or their treasurer for the time being, £100," is a good note; for there is no uncertainty as to the payee, as the trustees alone are to be taken as the payees, and the treasurer as their agent only to receive payment. (*e*) A note made by several persons, "payable to our and each of our order," is a good promissory note within the statute. (*f*)

1268. *Transfer of promissory notes.*—If the maker of the note promises to pay the amount of the note to

(*a*) *Oridge v. Sherborne*, 11 M. & W. 380. *Carlton v. Kenealy*, 12 M. & W. 139. 832; 23 L. J., Q. B. 298. *Enthoven v. Hoyle*, 13 C. B. 394. *Yates v. Nash*, 8 C. B., N. S., 581.

(*b*) *Plimley v. Westley*, 2 Sc. 423; 2 Bing. N. C. 251. (*e*) *Holmes v. Jaques*, L. R., 1 Q. B. 376; 35 L. J., Q. B. 130.

(*c*) *Kershaw v. Cox*, 3 Esp. 246.

(*f*) *Absolon v. Marks*, 11 Q. B. 191

(*d*) *Storm v. Stirling*, 3 Ell. & Bl. 17 L. J., Q. B. 7.

his own order, the note is not a promissory note within the statute of Anne until it has been indorsed by the maker; and then it becomes, in legal effect, a note payable to the bearer, and so falls within the statute. (*g*) The first transfer of a note payable to order must, as in the case of bills, be made by indorsement and delivery. If such a note is delivered in the first instance without indorsement, the equitable interest only is transferred to the holder; and, if the note is indorsed by the maker, and not delivered, no right to sue upon the instrument is transferred; and a subsequent delivery by the executor of the maker will not complete the informal transfer, and enable the holder to sue upon the instrument. (*h*)

1269. *Liability of the makers and indorsers.*—The maker of a promissory note stands in the same position as the acceptor of a bill of exchange. He is the party primarily liable upon the instrument, and is bound, when the note falls due, to seek out and pay the holder. He is not entitled to presentment, unless the note is payable at or after sight, or is made payable at some particular place. A promissory note, payable on demand, need not be presented to the maker in order to charge him, the commencement of an action against him being a sufficient demand of the money. But, in order to charge the indorser, the instrument whether payable on demand or not, must be duly presented to the maker, and notice of dishonor given; and, if payable on demand, it must be presented within a reasonable time, that is, a period reasonable with respect

(*g*) *Brown v. De Winton*, 17 L. J., 287. *Flight v. Maclean*, 16 M. & W. C. P. 285; 6 C. B. 336. *Masters v.* 51; 16 L. J., Ex. 23. *Wood v. Myton*, Baretto, 8 C. B. 433. *Hooper v.* 16 L. J., Q. B. 446.
Williams, 2 Exch. 20; 17 L. J., Ex. 315. *Gay v. Lander*, 17 L. J., C. P. (*h*) *Bromage v. Lloyd*, 1 Exch. 32.

to the circumstances connected with each particular case. (*i*)

1270. *Indorsement of notes overdue.*—A promissory note payable on demand can not be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such indorsement.

(*k*) Notes payable at and after sight must be presented to the maker before an action can be maintained against him for non-payment. “He is to see the note before he is to be called upon to pay it.” (*l*) When a note is made payable a certain time after sight, the time does not begin to run from the day of the date, but from the day of the note being presented for sight. (*m*)

1271. *Notes payable at a particular place.*—Where the place of payment of a note is merely stated in a memorandum at the foot or in the margin of a note, by way of direction or information to the payee, presentment at the place named is not essential; (*n*) but, if any place of payment be mentioned in the body of the note, it is part of the contract; and a presentment at the place indicated must be made. (*o*)

1272. *Days of grace* are allowed on promissory notes, (*p*) as well as on bills of exchange.

1273. *Bills and notes for the payment of sums under £1.*—The 26 & 27 Vict. c. 105, s. 1, repeals the

(*i*) *Chartered Mercantile Bank of India, London, & China v. Dickson*, L. R., 3 P. C. 574.

(*k*) *Brooks v. Mitchell*, 9 M. & W. 15.

(*l*) *Dixon v. Nuttall*, 1 C. M. & R. 309.

(*m*) *Sturdy v. Henderson*, 4 B. & Ald. 592.

(*n*) *Price v. Mitchell*, 4 Campb. 200. *Williams v. Waring*, 10 B. & C. 2.

(*o*) The 1 & 2 Geo. 4, c. 78, does not extend to promissory notes. *Spindler v. Grellett*, 17 L. J., Ex. 6. *Emblin v. Dartnell*, 12 M. & W. 830. *Trecothick v. Edwin*, 1 Stark. 468.

(*p*) *Brown v. Harraden* 4 T. R. 153.

17 Geo. 3, c. 30, and so much of any other Act as prohibits or restrains or imposes any penalty for the uttering or negotiating any promissory note (not being a note payable to bearer on demand), bill of exchange, draft, or undertaking in writing, being negotiable or transferrable, for the payment of 20s., or above that sum and less than £5, or on which 20s., or above that sum and less than £5, shall remain undischarged, made, drawn, or indorsed in any other manner than as directed by the said Act. (q) By the 48 Geo. 3, c. 88, s. 2, all promissory notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferrable, for the payment of less than 20s., are made absolutely null and void; and by the 7 Geo. 4, c. 6, heavy penalties are imposed (s. 3) upon all persons issuing or negotiating promissory notes payable to the bearer on demand for any sum of money less than £5; but by the 23 & 24 Vict. c. 111, s. 19, it is enacted, that it shall be lawful for any person to draw upon his banker, who shall *bonâ fide* hold money to or for his use, any draft or order for payment to the bearer, or to order on demand, of any sum of money less than 20s. The issue of bank notes has been subjected to various prohibitions and restrictions by the legislature. (r)

1274. *Dividend warrants*, issued by the Bank of England for the payment of dividends on stock in the public funds, are not negotiable, so as to entitle the holder to demand the dividend; but, as there is in general an acknowledgment at the foot of the warrant by the payee of his having received the dividend therein mentioned, it is the custom of the bank to pay the amount to the holder of the warrant and receipt; and these documents are accordingly

(q) To remain in force for three years, s. 2; but since continued.

(r) 3 & 4 Wm. 4, c. 98. 7 & 8 Vict. c. 32.

transferred from hand to hand, and are generally considered to be negotiable. (s)

1275. *Banker's checks.*—A check on a banker is a negotiable instrument payable either to bearer or to order. When it is drawn payable to bearer, it is treated as money or cash, and is transferable from hand to hand, like a bill of exchange, but does not require any acceptance by the banker on whom it is drawn to establish its validity. A person, therefore, who receives a check payable to bearer *bonâ fide* for value, relying on the order of the party making it, is entitled to recover the amount from him, although the check has been lost or stolen. (t) When it is drawn payable to order it is a bill of exchange, and negotiable as such when indorsed. (u) But the holder can not sue the banker upon whom it has been drawn, unless the banker has accepted the check, or promise to pay it to the holder. The post-dating of a check, whether it is payable to order or bearer, does not invalidate the instrument in the hands of a *bonâ fide* holder for value. (x)¹

1276. *Presentment of checks for payment.*—The holder of a check does not lose his remedy against the drawer by reason of non-presentment within any period short of six years after taking it, unless the insolvency of the banker on whom it is drawn has taken place in the interval, or unless there is an actual loss to the drawer by the delay. (y) To guard against loss from the insolvency of the drawee,

(s) *Partridge v. Bank of England*, 9 Q. B. 424-427.

(t) *Watson v. Russell*, 3 B. & S. 38; 31 L. J., Q. B. 304; 34 Ib. 93.

(u) *Keene v. Beard*, 8 C. B., N. S., 372; 29 L. J., C. P. 287. As to presentment of cheques, see *infra*.

(x) *Whistler v. Foster*, 14 C. B., N. S., 248; 31 L. J., C. P. 161. *Austin v. Bunyard*, 6 B. & S. 637; 34 L. J., Q. B. 217. *Bull v. O'Sullivan*, L. R., 6 Q. B. 209; 40 L. J., Q. B. 141.

(y) *Robinson v. Hawksford*, 9 Q. B. 52; 15 L. J., Q. B. 377

¹ See *ante*, note , vol. ii.

the holder must present the check for payment with reasonable promptitude, that is, in the course of the day succeeding that on which he receives the check from the drawer. If he neglects so to do, and the drawee afterwards becomes insolvent or stops payment, the loss will fall upon the holder of the check. If the check is presented in due time and refused payment, the loss will fall on the drawer. (z) If the holder of a check sends it to his agent for presentment by the post of the day after that on which he has received it, the agent has the following day to present it for payment. (a) If the check is delivered to the holder by the drawer after banking hours, and after it has become impossible to pay the check to a banker on that day, the delivery will count from the succeeding day; and, if the check is drawn upon a country bank situate at a distance, such distance must be taken into consideration in determining whether the check has been presented within a reasonable time. (b)¹

A creditor who has his debtor's agent's check on account of the debt, is bound to present it in a reasonable time; and, if by his delay he alters the position of the debtor for the worse, the debtor is discharged, notwithstanding he was not a party to the check. (c)

1277. *Summary remedy for non-payment of bills, checks, and notes.*—The 18 & 19 Vict. c. 67, provides a summary form of proceeding for the recovery of money due on bills, checks, and notes, which must be commenced within six months after the same shall

(z) *Laws v. Rand*, 3 C. B., N. S., 65; 30 L. J., C. P. 302. *Prideaux v. 442*; 27 L. J., C. P. 76. *Bailey v. Criddle*, L. R., 4 Q. B. 455.
Bodenham, 16 C. B., N. S., 288; 33 L. J., C. P. 252. (b) *Bond v. Warden*, 1 Coll. Ch. C 583.

(a) *Rickford v. Ridge*, 2 Campb. (c) *Hopkins v. Ware*, L. R., 4 Ex 537. *Hare v. Henty*, 10 C. B., N. S., 268; 38 L. J., Ex. 147.

¹ See *ante*, note , vol. ii.

have become due and payable. It enables the plaintiff to sign final judgment for the principal and interest, if the defendant shall not have obtained leave from a judge to appear and defend the action under the circumstances therein specified and provided for. (*d*) In the case of notes payable on demand, the proceeding must be taken within six months from the date of the note. (*e*) A party who has obtained leave to defend under this statute is not confined to the defense set up in his affidavit. (*f*)

1278. *Cancellation of bills and notes.*—If the drawer of a check or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces are pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it without having any just cause for supposing that it had been canceled. This has been held to be the case where the appearance of the instrument was consistent with its having been divided into two parts for the purpose of safe transmission through the post, and where it was believed to have been so divided by the plaintiff who received it. (*g*)

1279. *Proof of want of consideration.*—A bill or note, given in consideration of what is supposed to be a debt, is without consideration, if it appears that there was either a mistake in law (*h*) or in fact (*i*) as to the existence of the debt, and there has been no indorsement or transfer of the instrument for value. But, where there is no mistake either in law or in fact, but

(*d*) *Eyre v. Waller*, 5 H. & N. 463, 29 L. J., Ex. 246.

(*e*) *Maltby v. Murrell*, 29 L. J., Ex. 377; 5 H. & N. 815.

(*f*) *Saul v. Jones*, 1 El. & El. 59; 28 L. J., Q. B. 37.

(*g*) *Ingham v. Primrose*, 7 C. B., N. S., 82; 28 L. J., C. P. 295.

(*h*) *Southall v. Rigg*. *Forman v. Wright*, 11 C. B. 481.

(*i*) *Bell v. Gardner*, 4 M. & Gr 23.

a claim has been made by the plaintiff on the defendant, to which the defendant thinks he is not liable, but which claim the plaintiff is about to enforce by action, and the parties agree to a compromise, and the defendant gives his promissory note to the plaintiff for the payment of a certain sum, there is a good consideration for the note, and the instrument can not afterwards be avoided on the ground that there was no valid claim against the defendant, and no cause of action against him at the time of the compromise. (*k*)¹

1280. *Alterations in a bill or note avoiding the contract.*—An alteration of a bill or note in a material particular, after it has been negotiated, will avoid the contract, such as the addition to a promissory note for the payment of money with lawful interest, of the words "Interest at £6 per cent." written in the corner of the note, without the assent of the maker, after the note had been signed by him; (*l*) the cutting off the signature of one of several joint promisors who have united together in undertaking a joint liability by their joint note of hand; (*m*) the addition to the note of the name of a new promisor without the consent of the defendant; (*n*) the acceleration of the time of payment of a bill of exchange by an alteration in the date of the bill and the time that it has to run; (*o*)

(*k*) Cook v. Wright, 30 L. J., Q. B., 593.

321.

(*l*) Warrington v. Early, 2 Ell. & Bl. 763; 23 L. J., Q. B. 47. And see Hirschfield v. Smith, L. R., 1 C. P. 340; 35 L. J., C. P. 177.

(*m*) Mason v. Bradley, 11 M. & W.

(*n*) Gardner v. Walsh, 5 Ell. & Bl. 91; 24 L. J., Q. B. 285.

(*o*) Master v. Miller, 4 T. R. 320; 5 T. R. 367; 1 Smith's L. C. 458-490. Hirschman v. Budd, L. R., 8 Ex. 171; 42 L. J., Ex. 113.

¹ See Wood v. Schlater, 24 La. Ann. 284; First National Bank v. Sturgis, 8 Kan. 660; Porter v. Jones, 52 Mo. 399; Harwood v. Knapper, 50 Mo. 456; Bonesteel v. Bonesteel, 30 Wis. 516.

an insertion of an incorrect date, where the bill bore no date upon the face of it; (*p*) an alteration in the place of payment; or an insertion of some particular place of payment, without the privity and assent of the acceptor. (*q*)¹

1281. Immaterial alterations.—Whenever the alteration is immaterial, the substance of the contract remaining the same, the contract is not vitiated, although the alteration has been made by the plaintiff himself. Where, therefore, the date of a bill, payable three months after date, was altered from the 2nd to the 22nd of March, it was held, as between the indorsee and the acceptor, that the alteration was an immaterial alteration, the time of payment not being accelerated. (*r*) Where a promissory note expressed no time for payment, and while it was in the possession of the payee, the words “on demand” were added without the assent of the maker, it was held, in an action by the payee against the maker, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument. (*s*) An alteration or addition, moreover, to the contract, before

(*p*) *Harrison v. Cotgreave*, 4 C. B. 562.

N. R. 221. 4 M. & Gr. 561. *Burchfield v. Moore*, 23 L. J., Q. B. 261.

(*q*) *Calvert v. Baker*, 4 M. & W. 417. *Tidmarsh v. Grover*, 1 M. & S. 735. *Desbrow v. Wetherby*, 1 Mood. & Rob. 438. *Crotty v. Hodges*, 5 Sc.

(*r*) *Parry v. Nicholson*, 13 M. & W. 778.

(*s*) *Aldous v. Cornwall*, L. R., 3 Q. B. 573; 37 L. J., Q. B. 201.

¹ See *Major v. Hansen*, 2 Biss. 195; *Chism v. Toomer*, 27 Ark. 108; *Benedict v. Miner*, 58 Ill. 19; *Rainbolt v. Eddy*, 34 Iowa, 440; *Stoddard v. Penniman*, 108 Mass. 366; *Herrick v. Baldwin*, 17 Minn. 209; *Washington, &c., Bank v. Ecky*, 51 Mo. 272; *Peyton v. Harman*, 22 Gratt. 643; *Schryver v. Hawks*, 22 Ohio St. 308; *Page v. Morrell*, 3 Abb. App. Dec. 433. *Hunt v. Gray*, 35 N. J. L. 227; *Wagner v. Diedrich*, 50 Mo. 484.

it has been finally completed, made with the assent of the parties to be affected thereby, will not avoid the instrument, or render a fresh stamp necessary. (*t*) Where a joint and several promissory note was altered after the two first makers had signed the instrument, but before the defendant had affixed his signature, it was held that the note was not vitiated as regarded the defendant, and that no fresh stamp was requisite. (*u*) Where a bill was made payable on the 1st of January, and the person to whom it was directed struck out the word January, and inserted March, and then accepted the bill, and sent it to the drawer, who, perceiving the enlarged acceptance, struck out March and again inserted January, and at that time sent the bill for payment, which the acceptor refused, whereupon the holder of the bill again struck out January, and left the bill payable in March, as the acceptor had accepted it, it was held that the acceptor was responsible for the non-payment of the bill on the 1st of March, pursuant to his original acceptance. (*x*) Where the holder of a bill for value agreed to take a new bill, and a bill at three months was sent him, to which he objected, requiring a bill at two months, and the three was accordingly altered to two, and the bill made payable at two instead of three months, it was held that the alteration did not invalidate the bill. (*y*)

Whenever the plaintiff has altered a bill or note so as to vitiate the security, and deprive the defendant of a remedy which he would otherwise have had upon the instrument against the parties whose names are upon the face of it, the plaintiff will not only be de-

(*t*) *Fitch v. Jones*, 5 Ell. & Bl. 238;
24 L. J., Q. B. 293.

(*u*) *Wright v. Inshaw*, 1 Dowl., N.
S., 802.

(*x*) *Price v. Shute*, cited, 4 T. R.
336.

(*y*) *Tarleton v. Shingler*, 7 C. B.
812.

prived of all right of action upon the bill, but he will also lose all remedy for the recovery of the debt for which the bill was given. (*z*) But, if the defendant has assented to the alteration, and the security is vitiated for want of a new stamp, or the bill has been accidentally or ignorantly altered by the plaintiff, without any fraudulent intent, and the defendant's remedy against any other parties is not affected by the alteration, the plaintiff's right of action for the recovery of the debt on account of which the bill was given is not discharged. (*a*) Where the sum of £250 had been advanced to a banker upon the security of a promissory note, and the note was subsequently altered by the parties, and vitiated by reason of there being no fresh stamp, it was held that the £250 might be recovered independently of the note, upon a common count for money lent. (*b*) And, where the names of prior indorsers of a bill had been struck out by mistake, it was held that the erasure might be corrected. (*c*) It lies upon the party suing upon a bill or note to account for any material alteration appearing upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument, or render a fresh stamp necessary, (*d*) unless the making of the bill, as set out by the plaintiff, is admitted on the record, the defendant merely denying the indorsement to the plaintiff, (*e*)

(*z*) *Alderson v. Langdale*, 3 B. & Ad. 660.

(*a*) *Atkinson v. Hawden*, 2 Ad. & E. 628. *Sloman v. Cox*, 1 C. M. & R. 471.

(*b*) *Sutton v. Toomer*, 7 B. & C. 416.

(*c*) *Wilkinson v. Johnston*, 5 D & R.

412.

(*d*) *Knight v. Clements*, 8 Ad. & E. 215. *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 289. *Clifford v. Parker*, 3 Sc. N. R. 238. *Cariss v. Tattersall*, *Ib.* 257.

(*e*) *Sibley v. Fisher*, 7 Ad. & E. 446.

or the alteration is immaterial, and does not affect the plaintiff's right of action. (*f*)

If a bill of exchange or note is altered in any material particular, the remedy of the bonâ fide holder for value is confined to a right to recover the consideration for the bill as between himself and the party from whom he received it. A similar remedy may be resorted to by each indorsee against his immediate indorser, till the party is reached through whose fraud or laches the alteration was made; and the loss must rest with him, as it was his duty to have preserved the instrument in its original state. (*g*)

1282. *Loss of bills and notes.*—By the 17 & 18 Vict. c. 125, s. 87, it is enacted that, in actions founded upon a bill of exchange or other negotiable instrument it shall be lawful for the court, or a judge, to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument. (*h*) If the bill or note was not originally negotiable, that is, payable to bearer or to order, the loss of it is no defense to an action upon the instrument. (*i*) But, if a negotiable bill or note has been lost, the loss, if permitted to be set up, is an answer as well to an action upon the instrument as for the recovery of the debt for which it was given. (*k*)

1283. *Damages recoverable on the dishonor of bills.*—Where an action is brought by the holder of a bill of exchange, not being an accommodation bill

(*f*) *Earl of Falmouth v. Roberts*, 9 M. & W. 469.

(*g*) *Burchfield v. Moore*, 3 Ell. & Bl. 687; 23 L. J., Q. B. 263.

(*h*) *Noble v. The Bank of England*. 2 H. & C. 355.

(*i*) *Charnley v. Grundy*, 14 C. B. 614; 23 L. J., C. P. 121.

(*k*) *Hansard v. Robinson*, 7 B. & C. 95. *Crowe v. Clay*, 9 Exch. 608; 23 L. J., Ex. 150.

against the acceptor, and there has been a partial payment by the drawer of the amount due on the bill, the holder may nevertheless recover the whole amount of the bill from such acceptor; but he holds the difference between the amount of the bill and the total amount received from the acceptor and the drawer together, as a trustee for the drawer. If the bill is an accommodation bill, the holder can only recover from the acceptor the amount due, after giving credit for the payment. (*l*) When a bill drawn and indorsed in England, and payable abroad, is dishonored by the acceptor's non-payment, the holder is entitled to recover from the indorser the amount of the re-exchange, and not the amount he gave for the bill in England. (*m*)

1284. *Damages for not meeting bills at maturity.*—Where defendant's, a banking company, had, under special agreement, accepted the plaintiff's bills, but their bank broke before the bills arrived at maturity and the plaintiffs arranged with another house to take up the bills, and paid commission, and also paid the expenses of protesting the bills and of telegraphing, it was held that, although as a general rule in an action on a bill of exchange by an indorsee against the acceptor neither general nor special damages can be recovered, yet, under the above circumstances, the commission and other expenses were recoverable as the reasonable and material consequence of the defendants' breach of contract. (*n*)

1285. *Parties to bills—Agents.*—When the drawee is requested to pay a certain sum of money "on behalf," or "on account," of a named third party, and the

(*l*) Cook v. Lister, *ante*.

(*m*) Suse v. Pompe, 30 L. J., C. P.

(*n*) Prehn v. Royal Bank of Liverpool, L. R., 5 Ex. 92; 39 L. J., Ex 41.

drawee accepts in his own name on behalf of such third party, and the surrounding circumstances show that he had authority so to accept, and that he has bound such third party by his acceptance, he will not himself be personally liable upon his acceptance; (*o*) but, if the bill is drawn upon him without qualification, and he accepts in his own name, he can not exempt himself from the ordinary liability of an acceptor by saying that he accepts on behalf of some third party on whom the bill is not drawn. (*p*) If a bill of exchange is addressed to several persons, and one of them alone accepts it, he is personally responsible upon the bill. (*q*) Where a bill upon the face of it purports to be accepted "per procuration," that circumstance is a notice to whoever takes the bill that it has been accepted by an agent acting under an authority given to him by a principal; and the holder can not maintain an action against the principal if the authority has been exceeded. (*r*)

1286. *Promissory notes by trustees, agents, &c.*—If a party signs a promissory note whereby he promises in his own name to pay a sum of money on behalf of a third party, he will himself be personally responsible for the payment of the money, (*s*) unless it plainly appears from the surrounding circumstances that he contracted as agent, and bound his principal by the contract. (*t*) Parties who promise in their own names to pay money can not exonerate themselves from per-

(*o*) Leadbitter v. Farrow, *ante*.

(*p*) Mare v. Charles, 5 Ell. & Bl. 981; 25 L. J., Q. B. 119. Nichols v. Diamond, 9 Exch. 157. *Ante*.

(*q*) Owen v. Van Ulster, 10 C. B. 318.

(*r*) Stagg v. Elliott, 12 C. B., N. S., 373; 31 L. J., C. P. 260. Eyre v. McDowell, 14 Ir. C. L. R. 314.

(*s*) Healey v. Story, 3 Exch. 3; 18 L. J., Ex. 8. Dutton v. Marsh, L. R., 6 Q. B. 361; 40 L. J., Q. B. 175. *Ante*.

(*t*) Agg v. Nicholson, 1 H. & N. 165; 25 L. J., Ex. 348. Lindus v. Melrose, 3 H. & N. 137; 27 L. J., Ex. 327.

sonal liability by describing themselves as "trustees," "treasurers," or "secretaries" of a named charity, company, or association, (*u*) or as "executors." (*x*) But, if the promise is, on the face of the note, expressed to be made by a principal, and the party whose signature is attached to it signs the name of the principal to the instrument, adding his own name only as agent, he will, as we have seen, incur no personal liability upon the note, provided he was duly authorized to act in the matter. (*y*)

1287. *Bills of exchange and promissory notes by partners.*—A partner in a mercantile or trading firm may draw, accept, or indorse bills of exchange and promissory notes in the trading name of the firm so as to bind the partnership, because the drawing, accepting, and negotiating bills and notes are usual and necessary for the purpose of carrying on the trade and business of a mercantile firm. But it is not every partnership which gives such an authority. Solicitors and professional men in partnership have no such power; nor have brokers who are in partnership for the mere purpose of obtaining orders on commission and dividing the expenses. (*z*) Every one of the partners in a mercantile firm is liable upon such bills or notes, whether his individual name is or is not used in the collective name of the firm, and whether it does or does not appear upon the face of the instrument, and whether such partner is dormant and secret, or a known and active member of the co-partnership, and whether the proceeds of such bill or note are dedicated and applied to partnership purposes, or to the pri-

(*u*) *Price v. Taylor*, 5 H. & N. 540. 469. *Alexander v. Sizer*, L. R., 4 Ex Bottomley v. Fisher, 1 H. & C. 211; 102; 38 L. J., Ex. 59.

31 L. J., Ex. 417.

(*z*) *Yates v. Dalton*, 28 L. J., Ex.

(*x*) *Childs v. Monins*, 5 Moo. 282. 69. *Forster v. Macreth*, L. R., 2 Ex

(*y*) *Buckley, Ex parte*, 14 M. & W. 162.

vate use of the individual partner. (a) Where one of the acting partners of a firm accepted a bill in the name of the firm to obtain a loan, and then applied the money to his own private use, it was held that a secret partner, not known at the time of the acceptance to be a partner in the firm, might be sued upon the bill. (b) And, where a bill was indorsed by a partner in the trading name of the firm, it was held that a person not known to be a partner at the time of the indorsement might be sued upon the instrument. (c) "There may be partnerships," observes Lord ELLENBOROUGH, "where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any partners in the name of the firm or partnership." (d) But, if the taker or holder thereof knew at the time he received the bill or note that the transaction was not a partnership transaction, but the private affair and dealing of the single partner, the other members of the firm will not be liable thereon. The bill or note must, in order to bind the partnership, be made, accepted, or indorsed in the trading name of the firm, or in some adopted name, recognized and used by the partnership in its ordinary course of business; or, if made, accepted, or indorsed by the one partner in his own name, the drawing, acceptance, or indorsement must be expressed to be made by him for, and as the act of, the firm at large. (e) Where a member of a firm has no authority to

(a) *Lloyd v. Ashby*, 2 B. & Ad. 23.
Brown v. Kidger, 3 H. & N. 858.

(b) *Wintle v. Crowther*, 1 Cr. & J.
 316.

(c) *Vere v. Ashby*, 10 B. & C. 288.

(d) *Swan v. Steele*, 7 East, 213.
Thicknesse v. Bromilow, 2 Cr. & J.
 425.

(e) *Smith v. Jarves*, 2 Raym. 1484.
Galway v. Matthew, 1 Camp. 402.
Hall v. Smith, 1 B. & C. 407.

bind his partners by drawing or accepting bills, he can not bind them by giving a post-dated check. (*f*)

Where a bill of exchange is drawn upon a firm, and accepted by one of the partners in his own name, he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn. (*g*) Thus, where a bill of exchange was addressed to "James Masterman and Co.," and was accepted by James Masterman only, without the words "and Co.," it was held that the acceptance was the acceptance of the firm, and that all the partners were liable upon it. (*h*) If, however, the bill or note is drawn, or made, or accepted, or indorsed by the one partner in his own name only without mention of the partnership, and without it being expressed on the face of the instrument that the drawing or making, acceptance or indorsement, is made or done for the firm, the one partner whose name appears upon the instrument is the only person who can be sued thereon, although the proceeds thereof have been applied to the joint purposes of the firm, unless the partnership has been in the habit of paying bills and notes so made and negotiated, and has consequently adopted the name of the partner as the name of the firm in bill transactions. (*i*) If the firm carries on business in the name of an individual partner, his acceptance or indorsement will be treated as the acceptance or indorsement of the firm; and all the partners, consequently, will be liable upon the instrument. (*k*)

A partnership may have divers trading names, by

(*f*) Forster v. Mackreth, L. R., 2 Ex. 162.

(*g*) Mason v. Rumsey, 1 Camp. 385.

(*h*) Wells v. Masterman, 2 Esp.

(*i*) Emly v. Lye, 15 East, 7.

(*k*) South Carolina Bank v. Case, 8 B. & C. 436. And see Stephens v. Reynolds, 5 H. & N. 513, 29 L. J.

Ex. 278.

the use of any one of which by one of the partners it may be bound. If a firm has been in the habit of paying bills and notes, made, accepted, or indorsed in a name which is not the ordinary trading name of the co-partnership, it will be deemed to have given an implied authority to such partner to use such name, as the name of the firm, in bill transactions, and will be as much bound thereby as if the ordinary trading name of the firm had been made use of. (*l*) If a dormant or secret partner has contracted in the name of the firm, or in an adopted name, he may be sued in his real name. (*m*) When any one of the partners has accepted a bill of exchange, or indorsed a promissory note, in a name differing from the ordinary trading name of the firm, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the acceptor or indorser must be taken to have accepted or issued the bill or note on his own account, and not in the exercise of his general authority as a partner. (*n*)

1288. *Bills and notes by trustees or directors of co-partnerships.*—In order to render the shareholders or co-partners liable upon bills of exchange or promissory notes, accepted, made or indorsed by the trustees or directors in the trading name of the co-partnership, it must be made out affirmatively by the parties suing upon such bills or notes that the directors had either an express or an implied authority to bind the other members by drawing, accepting or making, or indorsing bills and notes, either by showing that companies instituted for similar purposes have constantly been in

(*l*) *Williamson v. Johnson*, 1 B. & C. 146.

(*m*) *Ball v. Gordon*, 9 M. & W. 345, 347.

(*n*) *Faith v. Richmond*, 11 Ad. &

E. 339. *Kirk v. Blurton*, 9 M. & W. 289. *Norton v. Seymour*, 3 C. B.

792. *Stephens v. Reynolds*, 5 H. & N. 517; 29 L. J., Ex. 278.

the habit of vesting such a power in the hands of their directors, or that it was absolutely necessary for the purpose of carrying on the concern that such a power should be placed in their hands. (*o*) If the directors, are authorized to issue bills, they must be drawn in conformity with mercantile custom and usage. (*p*)

1289. *Bills of exchange and promissory notes by registered companies.*—By the 25 & 26 Vict. c. 89, s. 47, it is enacted, that a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed, on behalf of the company, if it has been made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under the express or implied authority of the company. This section does not confer on all companies registered under the Act the power of issuing bills of exchange, such a power only existing where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred. (*q*) A promise by directors in their own names on behalf of the company will be binding on the company under this section, and will not, if the directors were duly authorized to make the promise, render them personally responsible. (*r*) But, if any director, manager or officer of any registered limited company, or any person on its behalf, signs, or authorizes to be signed, on behalf of such company, any bill of exchange

(*o*) *Dickinson v. Valpy*, 10 B. & C. 137. *Steele v. Harmer*, 14 M. & W. 831.

(*p*) *State Fire Ins. Co.*, 32 L. J., Ch. 300.

(*q*) *Peruvian Ry. Co. v. Thames and Mersey Marine Ins. Co.*, L. R., 2 Ch. 61; 35 L. J., Ch. 864.

(*r*) *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J., Ex. 327. *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J. Ex. 348. *Forbes v. Marshall*, 11 Exch. 174. *Halford v. Cameron's, &c.*, 16 Q. B. 444; 20 L. J., Q. B. 160. *Edward's v. Cameron s, &c.*, 6 Exch 269. *Alexander v. Sizer*, L. R., 4 Ex 192; 33 L. J., Ex. 59.

promissory note, indorsement, check, or order for money or goods, or issues, or authorizes to be issued, any bill of parcels, invoice, receipt, or letter of credit of the company, wherein the name of the company is not mentioned with the word "limited" after it, he is (s. 42) personally liable to the holder of the bill, &c., for the amount thereof, unless the same is duly paid by the company. (s) If the directors are, by the deed of settlement or articles of association, absolutely prohibited from borrowing money or issuing bills of exchange or promissory notes, the company can not be made responsible upon bills or notes issued in defiance of the prohibition, (t) unless the shareholders acquiesce in the proceeding, and do not call the directors to account. (u) If bills or notes issued by directors in their own names on behalf of the company are drawn or made without authority, or are informally drawn, and are not, consequently, binding upon the company, the parties who have signed them will themselves be responsible upon them. (x) When the directors are expressly authorized to accept bills or issue promissory notes on behalf of the company, the company will be bound if the authority is substantially acted upon. It need not be exercised in the very terms in which it is given, or be strictly or technically accurate in point of form; (y) and, if there has been a plain departure from the terms of the authority, and the shareholders have acquiesced in it, the company will be bound. (z) A proviso in a

(s) *Penrose v. Martyn*, 28 L. J., Q. B. 28; *Ell. Bl. & Ell.* 499.

(t) *Balfour v. Ernest*, 5 C. B., N. S., 601; 28 L. J., C. P. 170.

(u) *MARTIN B., Forbes v. Marshall*, 11 Exch. 170.

(x) *Penkivil v. Connell*, 5 Exch. 381. *Healey v. Storey*, 3 Ib. 3. *Dutton v.*

Marsh, L. R., 6 Q. B. 361; 40 L. J., Q. B. 175.

(y) *Thompson v. Wesleyan, &c.*, 8 C. B. 861. *Land Credit Company of Ireland, In re*, L. R., 4 Ch. 460; 40 L. J., Ch., 341.

(z) *Allen v. Sea, &c., Co.*, 9 C. B. 578; 19 L. J., C. P. 305.

bill of exchange drawn by a joint-stock company, limiting the liability thereunder, is repugnant and void.

(a) Where a company is being voluntarily wound up, and there are four liquidators, one of them can not, in the absence of any authority from the company, and solely upon the strength of a resolution of his co-liquidators, accept bills on behalf of the company. (b)

SECTION II.

BILLS OF LADING AND DOCK WARRANTS.

1290. *Bills of lading.*—We have already considered the nature and effect of a bill of lading as between the carrier by whom it is issued and the person in whose favor it is made; and therefore we shall only discuss here the quality of negotiability which has been attached to bills of lading or enlarged by recent legislation.

1291. *Assignment of bills of lading.*—Bills of lading, made out to the order of the shipper or consignee, are negotiable and transferable by indorsement and delivery, so as, in the absence of notice of fraud, or insolvency, or want of title on the part of the indorser, (c) to vest the right of property and ownership of the merchandise comprised therein in a bonâ fide indorsee or holder for value, and defeat the right of the unpaid

(a) *State Fire Ins. Co., In re, Ex parte Meredith*, 32 L. J., Ch. 300.

(b) *London and Mediterranean Bank, In re*, L. R., 5 Ch. 567; 40 L. J., Ch. 26. *Ex parte Birmingham Banking Co.*, L. R., 3 Ch. 651; 36 L. J., Ch. 807. *London and Mediterra-*

nean Bank, In re, Ex parte Agra & Masterman's Bank, L. R., 6 Ch. 206.

(c) *The Argentina*, L. R., 1 A. & E. 370. *The Marie Joseph*, L. R., 1 P. C. 219. *Rodger v. Comptoir, d'Es-compte de Paris*, L. R., 2 P. C. 393; 40 L. J., P. C. 1. *Gilbert v. Guignon* L. R., 8 Ch. 16.

vendor to stop them in transitu. (*d*) The contract evidenced by the bill of lading is now also transferred by the indorsement and delivery of the instrument to the indorsee, so as to enable the latter to maintain an action or be sued upon it. (*e*) A bill of lading remains in force until there has been a complete delivery of the goods thereunder to a person having a right to receive them, and is not spent or exhausted by the landing and warehousing of them, at a sufferance wharf, at all events as long as they are under stop for freight; and the person who first gets the bill of lading (though only one of a set of three), gets the property which it represents, and need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, so that any subsequent dealings with the others of the set are subordinate to the rights passed by that one. Therefore, where A, the indorsee of a bill of lading drawn in a set of three, making cotton deliverable on payment of freight, having got the cotton landed at a sufferance wharf, with a stop thereon for freight, procured an advance from M on the deposit of two copies of the bill of lading, and subsequently, the stop for freight having been removed, obtained a second advance from B on the deposit of the third copy, and B afterwards hearing of the prior advance, sent his copy of the bill of lading to the wharf, and procured the cotton to be transferred into his own name, and afterwards sold it and received the proceeds.

(*d*) *Pease v. Gloahac*, L. R., 1 P. C. 219; 35 L. J., P. C. 66. *Coventry v. Gladstone*, L. R., 4 Eq. 493.

(*e*) 18 & 19 Vict. c. 111, annulling *Thompson v. Dominy*, and *Howard v. Shepherd*. And see *Dracachi v. The*

Anglo-Egyptian Navigation Co., L. R., 3 C. P. 190. *Smurthwaite v. Wilkins*, 11 C. B., N. S., 842; 31 L. J., C. P. 214. *The Figlia Maggiore*, L. R., 2 A. & E. 106; 37 L. J., Adm. 52. *The Freedom*, L. R., 3 P. C. 594. 24 Vict. c. 10, s. 6.

it was held that the bill of lading when deposited with M retained its full force and effect; that there was therefore a valid pledge of the cotton to M; and that he could maintain an action against B, either for the proceeds of the sale or for a wrongful conversion of the cotton. (*f*) If the consignor, under a bill of lading making the goods deliverable to order or assigns, indorses the bill in blank, and deposits it as a security for an advance of money, and on repayment of the advance the bill is re-indorsed and re-delivered to him, he is remitted to all his rights under the original contract as against the shipowners, and may sue them for a breach, whether occurring before or after the re-indorsement. (*g*) Where a bill of lading and a bill of exchange to cover the goods included in the bill of lading are sent in a letter to the vendee of the goods, it is a well-understood rule that the bill of exchange must be accepted, or the bill of lading can not be retained; and, where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it. (*h*)

1292. *Dock warrants* have been held negotiable and transferable, so as to vest the property in goods deposited in the docks in the holders of the warrant; (*i*) but the contract is not transferred by the indorsement and delivery of the warrant.

(*f*) *Meyerstein v. Barber*, L. R., 2 C. P. 38, 661; 36 L. J., C. P. 289; L. R., 4 H. L. 317; 39 L. J., C. P. 197.

(*g*) *Short v. Simpson*, L. R., 1 C. P. 248; 35 L. J., C. P. 147.

(*h*) *Shepherd v. Harrison*, L. R., 4 Q. B. 196, 493; *Ib.* 5 H. L. 116; 38 L. J., Q. B. 105, 177; 40 *Ib.* 148.

(*i*) *Zwinger v. Samuda*, 1 Moore 12.

CHAPTER VII.

CONTRACTS OF ASSOCIATION.

SECTION I.

CONTRACTS OF PARTNERSHIP.

1293. *Participation in profits constituting a partnership.*—Any number of persons not exceeding twenty, (a) may constitute themselves partners by associating together and contributing in equal or unequal proportions money, labor, skill, care, attendance, or services in the accomplishment of a common object, or the furtherance of a joint undertaking, upon the express or implied understanding that they are to share in certain proportions the profit and loss of the transaction. (b) The contract is founded on the consent of the parties, and may be created and established by their acts and deeds, and their common participation in the profit and loss of a trade or business, or of a particular speculation or adventure, as well as through the medium of an express contract of co-partnership. If one man joins another in the furtherance of a particular undertaking, and contributes work and labor, services and skill, towards the attainment of the common object, upon the understanding that the remuneration is to depend upon the realization of

(a) 25 & 26 Vict. c. 89, s. 4.

(b) Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine ut quod

inde redivit lucrum inter singulos pro rata dividatur. Puff. Lex. Nat., l. 5, ch. 8, s. 1.

profits, so that if the business is a losing business he is to get nothing, he stands in the position of a partner in the undertaking, and not in that of a laborer or servant for hire. (*c*)

1294. *Participation in profits not making the participators partners.*—A person who merely receives out of the profits the wages of labor, or a commission as a hired servant or agent, such as a factor, foreman, clerk, or manager, and who has no interest or property in the capital stock of the business, is not a partner in the concern, although his wages may be calculated according to a fluctuating standard, and may rise and fall with the accruing profits. (*d*) Thus, the captain of a vessel who has no interest in the ship or cargo is not a partner with the joint adventurers in the profit and loss of the voyage, although his wages are proportioned to the amount of profit realized. (*e*) Where the owner of a colliery employed a man as captain of one of his barges to carry out and sell coal, and allowed him two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery and the wages and pay of the crew, it was held that, as the captain had no interest or right of property either in the boat or the coals, he was merely a servant of the owner, and not a partner with him in the coal trade. (*f*) So, where an apothecary assigned his business on the terms that he was to continue to reside on the premises, and attend to the practice, and receive one moiety of the clear profits of the business

(*c*) *Green v. Beesley*, 2 Sc. 169; 2 Bing. N. C. 108. *Barry v. Nesham*, 16 L. J., C. P. 21; 3 C. B. 641.

(*d*) 28 & 29 Vict. c. 86, s. 2.

(*e*) *Pott v. Eyton*, 3 C. B. 32; 15 L. J., C. P. 257. *Andrews v. Pugh*, 24 L. J., Ch. 55. *Dry v. Boswell*, 1

Campb. 329. *Mair v. Glennie*, 4 M. & S. 244. *Harrington v. Churchward*, 29 L. J., Ch. 521.

(*f*) *Hartley's case*, Russ. & Ry. 141. *Reg. v. Wortley*, 15 Jur. 1137. *Stocker v. Brockelbank*, 20 L. J., Ch. 401. *Hesketh v. Blanchard*, 4 East, 144.

at the expiration of the year, it was held that this did not create a partnership during the year between the parties, but that it was merely a mode of paying the plaintiff for his services. (*g*) So, in the French law, when a merchant, instead of a fixed salary, agrees to give his agent a certain proportion of the profits, the agent is not considered, on that account, to be a partner with the merchant; and, when one person consigns goods to another to be sold, under an agreement that the consignee shall have a certain portion of the proceeds of the sale, the consignee is not, on that account alone, to be considered a partner. (*h*) So, when persons unite together for the purpose of carrying on a common undertaking, and some of them find the money, stock, and equipments necessary to carry it on, whilst others merely contribute labor in return for a share in the gross earnings, there is no partnership as between the mere laborers in the undertaking. (*i*) Where R resided with his father, and assisted him in his business for several years, and the signboard, the invoices, and the banking account were in the name of "R & Son," and they drew and accepted bills under the same title, and executed a deed which described them as co-partners, it was held, nevertheless, after the death of the son, that they were not partners *inter se*. The circumstances relied on in coming to that conclusion were, the absence of any division of profits in the books, which were kept by the son; the absence of proof of the son's having any capital, or being entitled to receive any share of the profits; the fact of his having, when he ceased to reside with his father,

(*g*) *Rawlinson v. Clarke*, 15 L. J., No. 969. *Duvergier, Droit civ.*, tom. Ex. 171; 15 M. & W. 292. 5, No. 48, 56.

(*h*) *Pardessus, Droit Commercial*, (*i*) *Wilkinson v. Frazier*, 4 Esp 181.

made no request for an account of the profits, but accepted £1 a week as a remuneration, until his death, six months afterwards; and the testimony of the members of the family. (*k*)

1295. *Payment of interest out of profits.*—A person who merely lends money to a firm in partnership to be employed in the business, or who receives interest for money advanced, is not a partner or joint adventurer in the business, as the money is payable at all events, and the right to receive it does not depend upon the contingencies and fluctuations of the trade. (*l*) If a partner withdraws from the firm, leaving a certain amount of capital in the concern, for which he is to receive interest and a terminable annuity payable at all events, this arrangement will not amount to a perpetuation and continuation of the preceding partnership. But, if sums professed to be received by way of interest, or an annuity, rise and fall with the accruing profits and the fluctuations of trade, the party receiving such sums of money does not stand in the position of a creditor of the partnership, but in that of a joint speculator and adventurer in the profits and losses of the business, risking his money in the concern as a co-partner, (*m*) unless the annuitant is the widow or child of a deceased partner, or is receiving the annuity in consideration of the sale by him of the good-will of the business, within ss. 3 & 4 of the 28 & 29 Vict. c. 86, or unless the lender brings himself within the first section of the same statute, which enacts that the advance of money by way of loan to a partnership, company, corporation, or person engaged, or about to engage, in trade, upon a contract in writ

(*k*) Radcliffe v. Rushworth, 33 518.

Beav. 484.

(*m*) Grace v. Smith, 2 W. Bl. 1000.

(*l*) Elgie v. Webster, 5 M. & W. *Ex parte* Chuck, 1 M. & Sc. 616.

ing securing to the lender a rate of interest varying with the profits, or a share of the profits, of the trade shall not, of itself, constitute the lender a partner with the person carrying on the trade.

1296. *Joint purchases of goods.*—If several persons join together in making a purchase of goods, they do not, by so doing, constitute themselves partners, unless they are jointly concerned in the subsequent disposal of such goods. If, for example, four persons agree to purchase a pipe of Madeira, and afterwards to divide it amongst them for their own separate use and consumption, they do not, in contemplation of law, become partners in the transaction *inter se*, although they are part owners of the wine when purchased, and may be jointly responsible to the vendor for the price of it. But, if the wine, when purchased, is to be re-sold upon the joint account of the four, they then become partners in the transaction. If such purchasers, intending to divide the goods as they are purchased, and not to deal with them afterwards for their joint profit, employ an agent to go into the market and make the purchase, or send one of their own body to strike the bargain as the ostensible buyer, they do not become partners in the purchase, and are not even jointly responsible to the vendor for the price, whether the ostensible buyer buys in one lot, and makes one purchase on behalf of all jointly, or makes several purchases on behalf of each individually. (n) “This agreement,” observes DOMAT, “renders the thing bought the common property of all of them; but it does not join them together in partnership; for they are not bound together by the choice of the persons, but only by the thing which they have in com-

(n) Coope v. Eyre, 1 H. Bl. 37. Hoare v. Dawes, 1 Doug. 373.

mon." (o) In every partnership there is a community of interest; but every community of interest does not create a partnership. (p)

1297. *Tenancy in common of chattels not constituting a partnership.*—"If two have jointly by gift, or by buying, a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to another, the grantee and the other which did not grant shall have and possess such chattel in common." (q) And, if two tenants in common of a horse mutually agree that one of them shall have the general management of the horse, and enter him for different races, and that the expenses of the horse's keep and the winnings at races shall be equally divided between them, this will not make them partners in the horse, or prevent the one who has paid for the horse's keep from recovering a moiety of the cost thereof from his co-tenant in common. (r)

1298. *Conditions precedent to the formation of a partnership.*—"If a person agrees to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, there is no contract of partnership until all those conditions are performed." (s) If a prospectus for the formation of a partnership states that the capital is to consist of a certain amount of money, to be divided into a certain number of shares,

(o) De la Société, liv. 1, tit. 8, s. 3, 7. "In emptionibus qui nolunt inter se contendere, solent per nuntium rememere in commune, quod a societate, longe remotum est." Dig. lib. 17, tit. 2, lex. 33.

(p) Domat (Société), tit. 8. Dig. lib. 17, tit. 2, lex 31. "Toute société est une communauté, mais toute com-

munaauté n'est point une société." Duranton, 17 art. 320.

(q) Litt. sec. 321.

(r) French v. Styring, 2 C. B., N S., 357; 26 L. J., C. P. 181.

(s) Dickinson v. Valpy, 10 B. & C. 142. Bourne v. Freeth, 9 B. & C. 640. Howell v. Brodie, 8 Sc. 372.

and that a deed of co-partnership is to be executed, a subscriber who takes shares, and pays a deposit thereon, does not become a partner with the projectors and other subscribers, unless all the shares have been taken, the full amount raised, and the deed executed. (*t*) But, if, with a full knowledge of the terms of the partnership remaining unfulfilled, and of the conditions on which the partnership was to be formed being unaccomplished, he does acts amounting to an assent to the carrying on of the concern in its incomplete state, such acts amount to a waiver of the conditions, and he becomes a partner in an actual existing partnership. (*u*) And a partnership may commence at once, although a deed of co-partnership or of settlement has to be executed, and other things remain to be done at some subsequent period. (*x*)

It is no answer to an action for breach of an agreement to enter into partnership with the plaintiff, that after the agreement, and before breach, the defendant discovered that the plaintiff had, before the agreement acted with fraud and dishonesty towards a former partner of the plaintiff in the conduct of a partnership business which had been carried on by the plaintiff and such partner, and that such fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the agreement. (*y*)

1299. *Specific performance of a contract for a partnership.*—As a general rule, the court will not decree specific performance of a contract for partnership, whether for an indefinite or for a specified

(*t*) Fox v. Clifton, 4 M. & P. 676; 6 Bing. 776. Pitchford v. Davis, 5 M. & W. 2. Galvanized Iron Co. v. Westoby, 8 Exch. 17.

(*u*) Tredwen v. Bourne, 6 M. & W.

461. Steigenberger v. Carr, 3 Sc. N. R. 466.

(*x*) Battley v. Bailey, 1 Sc. N. R. 143.

(*y*) Andrews v. Garstin, 31 L. J., C P. 15.

period. (z) But, after a partnership has commenced, the court will carry into effect the articles of partnership.

1300. *Of a partnership in profits, but not in the capital stock.*—There may be a partnership as regards the accruing profits of a business or joint speculation when there is no partnership, nor even a community of interest, in the capital stock of the business. Thus, where several persons unite together for the purpose of carrying on the business of common carriers of passengers and goods, and one finds a coach, and the others divide the road into districts, and each horse and conveys the coach through his own district, finding his own horses, harness, stables and equipments, servants and coachmen, and all things necessary for the purpose, there is no partnership in the stock-in-trade, although there is a partnership in the accruing profits. (a) So (to cite an example from Pothier), if the separate owners of two cows agree to send their milk together to market, and sell it for their joint benefit, there is no partnership in the cows, although the parties are partners in the sale of the milk. And, if goods are sent to a broker to sell, under an agreement that he is to have half of whatever he can get for them beyond a certain amount, there is no partnership in the goods, although he is a partner with the owner in the sale. (b) If an author and a publisher agree to publish and sell a work upon their joint account, and to divide the profits of the sale, and it is stipulated between them that the author shall write the book, and furnish a certain quantity of manuscript, and that the publisher shall print and publish it at his own ex-

(z) *Scott v. Rayment*, L. R., 7 Eq. 51.

112; 38 L. J., Ch. 48.

(b) *Smith v. Watson*, 2 B. & C.

(a) *Barton v. Hanson*, 2 Taunt. 401.

pense, receive the produce of the sale, and, after deducting the expenses of the publication, divide the profits between himself and the author, there is no partnership in the unsold copies of the work, but only in the profits of the sale. (c) In many cases, however, where parties agree to manufacture a commodity to be sold on their joint account, the one finding the raw material and the other the labor and skill necessary for the purpose, there is a partnership between them in the manufactured article itself, as soon as it is completed and made ready for sale, as well as in the profits of the sale. (d)

1301. *Introduction of new partners.*—A partner in a private commercial partnership (not being a public joint-stock company with transferable shares) can not introduce a stranger into the firm as a partner without the consent of all the members of the co-partnership. (e)

1302. *Contracts between the firm and one of the partners.*—At common law if a plaintiff in an action against a firm in partnership upon a partnership contract was himself a member of the firm, the action was not maintainable; for, being himself liable as one of the partners upon all contracts binding upon the co-partnership, he was in principle, it was said, both plaintiff and defendant in the action, which could not be permitted. (f)

This rule of law was often productive of great hardship and inconvenience, as it deprived a partner

(c) *Wilson v. Whitehead*, 10 M. & W. 503.

(d) *Puff. de jure nat. et gent. lib. 5, ch. 8, § 14, ed. 1729.*

(e) *Domat, de la Société, tit. 8, s. 2, No. 5. Ex parte Barrow*, 2 Rose, 225. "Socius mihi esse non potest, quem ego socium esse nolui. quid ergo, si

socius meus eum admisit, ei soli socius est." *Dig. lib. 17, tit. 2, l. 19, 20.*

(f) *De Tastet v. Shaw*, 1 B. & Ald. 669. *Neale v. Turton*, 12 Moore, 368; 4 Bing. 149. *Mainwaring v. Newman*, 2 B. & P. 120, 125. *Teague v. Hubbard*, 8 B. & C. 345.

of all remedy at common law for the recovery of money lent or goods supplied to, or work done by, him for the benefit, and at the request, of the firm, after he became a partner, (*g*) unless he had taken care to obtain the individual and personal security of the other partners for the repayment of the money, or the price of the goods and the work; (*h*) and he was consequently frequently driven into courts of equity for relief, where no technical difficulty was allowed to stand in the way of substantial justice. (*i*) One of the absurd consequences of this rule was, that the partners in one house of trade could not maintain an action against a partner in another house of trade, upon contracts made between the co-partnerships, if one of the partners of either house happened, at the time of making such contracts, to be a partner in both houses, whether the action was brought in the lifetime of the common partner or after his decease. (*k*) "In this respect," observes STORY, J., "the Roman law, the law of France, and the law of Scotland present a marked contrast to the common law." (*l*)

1303. *Contracts between partners individually in their own names.*—But, if the contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, was the individual contract of the partners who were parties to it, the objection

(*g*) He was not, of course, precluded from suing in respect of money lent or work done before he became a partner. *Lucas v. Beach*, 1 Sc. N. R. 350.

(*h*) *Moffat v. Van Mullingen*, 2 B. & P. 124, n. *Perring v. Hone*, 12 Moore, 146. *Neale v. Turton*, *Ib.* 365. *Goddard v. Hodges*, 1 Cr. & M. 37. *Sharpe v. Cummings*, 14 L. J., Q. B. 10.

(*i*) By the Roman law every partner who incurred expenses in the common affairs of the firm was entitled to compensation out of the joint stock. Dig. lib. 17, tit. 2, lex 52, § 4; lex 61.

(*k*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*l*) Story on Partners, 323, n. 1; 345, n. 5.

did not apply. (*m*) Bills of exchange drawn by one partner on one or more of his co-partners individually and accepted by any one or more of them individually in his or their own name or names, no mention being made of the firm, rendered the parties whose names appeared on the face of such bills individually liable to the payee, whether he was a partner with them in the firm or not, and whether the bill had or had not been drawn and accepted in respect of a partnership transaction, inasmuch as the contract was not, in such a case, the contract of the firm, but the contract of the individual partner or partners signing it. (*n*)

Covenants and agreements between partners to contribute capital or labor to the joint stock of the co-partnership, or not to trade on their own account, entered into by them in their own names with each other, created, consequently, a binding obligation upon such partners. The covenant of each covenantor was, in contemplation of law, made with all the rest, excluding himself; and all the rest were joint against him; "for, if there be twenty partners and one of them covenants with all the rest, he is in that respect several from them all, and they all joint against him." (*o*) And, as regarded simple contracts between partners in their own names individually for the formation of a joint stock, and a contribution of capital by each of them, any one of the partners neglecting to pay his proportion of the agreed capital might be sued by all the rest, as the contract was in

(*m*) *Lomas v. Bradshaw*, 19 L. J., C. P. 273.

(*n*) *BEST*, C. J., 12 *Moore*, 368. *Fox v. Frith*, 10 M. & W. 131. *Siffkin v. Walker*, 2 *Campb.* 307.

(*o*) *Thimblethorp v. Hardesty*, 7 Mod. 117. *Eccleston v. Clipsham*, 1 Saund. 153. *Vesey v. Mantell*, 9 M. & W. 325. *Saunders v. Johnson*, Skin. 401. *Spencer v. Durant*, Comb. 115.

like manner with all the rest, excluding himself, he being in contemplation of law several from them all in respect of his particular share of the joint contribution, and they all joint against him. (*p*) If several of the partners signed an agreement, constituting one of their number a trustee for the whole body, and authorizing him to sue for and receive their several contributions to the joint stock, each of the partners signing the agreement was liable to an action at the suit of the partner so appointed for not paying up his share of the contribution. (*q*) If two persons agreed to divide the profits of a joint adventure, and to bear equally the expenses of setting the scheme afloat, and one of them paid the whole expense, he might sue the other for a moiety of the charges he had incurred. (*r*)

Where an author and a publisher undertook the publication and sale of a work for their joint benefit, the author agreeing to supply a certain quantity of manuscript, and the publisher agreeing to print and publish the work at his own expense, and to divide the profits with the author, and the latter, after a portion of the work had been printed, refused to complete it, the publisher might have maintained an action against him for the damage he sustained by reason of the non-performance of the contract. (*s*)¹

1304. *Distribution of the profits of co-partnership.*—If a partner, having the general conduct and management of a partnership business, had covenanted in his own name with another partner to render

(*p*) *Vening v. Leckie*, 13 East, 123. *Radenhurst v. Bates*, 11 Moore 7. 429.

(*q*) *Brown v. Tapscott*, 6 M. & W. (*r*) *French v. Styring*, *ante*.

(*s*) *Gale v. Leckie*, 2 Stark. 107.

¹ See Morgan's Law of Literature, vol. ii. 421.

accounts, and divide profits in hand, an action was maintainable against him by the covenantee for not accounting; (*t*) but there was no remedy against him at common law for not dividing the profits, so long as the partnership continued, and the trading transactions of the firm had not been brought to a close. If the partners resorted to the Court of Chancery for an account, they must by their bill have prayed for a dissolution. (*u*) In the absence of any evidence, the presumption is that partners are equally entitled to the profits and equally liable to bear the losses of the business. (*x*)

1305. *Action by one partner against another for a balance found to be due on a settlement of accounts.*—When the partnership was at an end, and all its trading transactions had been brought to a close, and an ascertained balance of profit remained in the hands of one of the late partners upon a general settlement of the accounts, an action was maintainable for the recovery of such balance. (*y*)

1306. *Action for a share of the profits of a particular joint adventure*—Where partners had merely agreed to divide the profits of one joint adventure, and all outstanding debts and liabilities in respect thereof had been satisfied and discharged, one of the partners might have brought an action for his share of an ascertained balance which had been received by another. (*z*) But, if it appeared that the parties were

(*t*) *Owston v. Ogle*, 13 East, 541.

(*u*) *Loscombe v. Russell*, 4 Sim. 10.
By the Roman law an action by one partner against the others for an account operated as a dissolution of the co-partnership. Dig. lib. 17, tit. 2, lex 65.

(*x*) *Collins v. Jackson*, 31 Beav. 645.

(*y*) *Foster v. Allanson*, 2 T. R. 479.

Rackstraw v. Imber, Holt, N. P. C. 370. *Wray v. Milestone*, 5 M. & W. 21. *Jackson v. Stopherd*, 2 Cr. & M. 361. *Brierly v. Cripps*, 7 C. & P. 709. *Winter v. White*, 3 Moore, 674. *Henley v. Soper*, 8 B. & C. 16.

(*z*) *Wilson v. Cutting*, 4 M. & Sc. 268. *Goodyear v. Simpson*, 15 M. & W. 16, 15 L. J., Ex. 191.

continuing partners in trade, so that the profit upon one transaction might be absorbed by the losses upon other subsequent transactions, no action was maintainable for the balance of profit appearing upon any one particular statement of accounts respecting bygone transactions completed and done with. (*a*)

1307. *Contribution between partners to the common loss.*—The courts of common law professed to be utterly unable to investigate partnership accounts; and, therefore, whenever the right of contribution between partners depended upon the state of partnership accounts and dealings and the existence of a balance in hand, the claimant must have resorted to a court of equity for relief. (*b*) But, when the partnership was at an end, and the trading operations had been wound up and completed, a right to contribution as between those who have been lately partners existed. Thus, where a partnership business was brought to a close, and the accounts made out, and shown to the defendant, one of the partners, who promised to pay to the plaintiff his proportion of the loss, but failed so to do, it was held that the latter was entitled to recover it in an action on an account stated. (*c*) And, if the partnership had been confined to a particular transaction and joint speculation, which had proved to have been a losing adventure, and one partner had been compelled to pay the whole loss, or more than his proper proportion of it, such partner might, if the joint undertaking had been brought to a close, and there were no open and unsettled accounts respecting the matter, and nothing more to be received in respect thereof, have maintained an action against his late co-partner

(*a*) *Fromont v. Coupland*, 9 Moore, 504. *Sadler v. Nixon*, 5 B. & Ad. 936. 323. *Carr v. Smith*, 5 Q. B. 128-138. Dig. lib. 17, tit. 2, lex 57.

Ante.

(*c*) *Brown v. Tapscott*, 6 M. & W. 123.
(*b*) *Pearson v. Skelton*, 1 M. & W. 123.

in the business for his share of the contribution towards the common loss. (*d*)

1308. *Particular transactions not connected with the general account of profit and loss.*—General partners in trade were not precluded, as we have seen, from suing each other upon special contracts entered into with each other individually on their own private account, although such contracts might have been made concerning the partnership business, and were intended to promote the general prosperity of the co-partnership. (*e*) If one partner, for example, lent money to another to be employed in the business, or pledged his own private credit to enable his co-partner to obtain money or goods for the purpose of making up his proportion of the contribution to the general stock, the partner who had so lent his money, or pledged his credit, had the same remedy against the co-partner in whose favor he had acted as any third party would have had. (*f*) So, if one partner received money which properly belonged to his co-partner, and not to the partnership, and appropriated it by mistake to the use of the firm, he was responsible to the partner whose separate money it was, for the repayment to him of the amount. (*g*) And, if one partner borrowed money from the firm, and by his promissory note promised one of the partners individually to repay the amount, he was liable upon the note, although the money, when recovered by the holder of the note, would be the money of the firm. (*h*)

(*d*) *Burnell v. Minot*, 4 Moore, 342. *Holmes v. Williamson*, 6 M. & S. 158. *Ayr.* 48. *Helme v. Smith*, 5 M. & P. 744; 7 Bing. 714. *Hesketh v. Blanchard*, 4 East, 144.

(*e*) *Coffee v. Brian*, 10 Moore, 345.

(*g*) *Smith v. Barrow*, 2 T. R. 476.

(*f*) *Elgie v. Webster*, 5 M. & W. 518. *Ex parte Notley*, 1 Mon. &

(*h*) *Lomas v. Bradshaw*, 19 L. J. C. P. 273.

1309. *Purchases by one partner on behalf of the firm.*

—Where four partners carrying on the business of sugar-refining intrusted to one of them (who was a wholesale grocer) the duty of buying sugars on behalf of the firm, and the partner so employed sold to the firm his own sugars, making a profit to himself on his dealings and transactions, without the knowledge of his co-partners, it was held that the firm was entitled to the whole of this profit. (*i*)

1310. *Fraudulent use of the co-partnership name.*

—If one partner has cheated his fellow-partners through the intervention of a promissory note, given by him in the name of the firm, the fellow-partners are entitled to recover against him the sum paid in satisfaction of the apparent debt of their own on the note created by his fraud on the partnership. (*k*)

1311. *Contracts of partnership induced by fraud.*

—If a person has been induced by fraudulent representation by one or more of several partners to become a member of the firm, he is entitled to relief, and to have the contract set aside. (*l*)

1312. *Of dissolution of partnership.*—If no time has been limited for the dissolution of a general trading partnership, it is a partnership at will, and may be dissolved at the pleasure of any one or more of the partners. (*m*) If the co-partnership has been contracted by parol, it may be renounced by parol; but if it has been established by deed, the renunciation and disclaimer of it by the party who withdraws from the firm ought to be made by deed. (*n*) If the part-

(*i*) *Bentley v. Craven*, 18 Beav. J., Ch. 95.

75.

(*m*) *Pearce v. Lindsay*, 3 De G. J. &

(*k*) *Cross v. Cheshire*, 7 Exch. 46; S. 139. *Shepherd v. Allen*, 33 Beav. 21 L. J., Ex. 3.

577.

(*l*) *Rawlins v. Wickham*, 3 De G. & J. 304. *Jauncey v. Knowles*, 29 L. 49.

(*n*) *Peacock v. Peacock*, 16 Ves.

ners have agreed that the partnership shall continue for a definite period, it can only be dissolved before the expiration of the term limited by the mutual consent of all the parties, or by the bankruptcy, outlawry, embezzlement, felony, or death of any one or more of them, or by the decree of the court. (*o*) Where a partnership originally carried on under articles for a fixed term of years is continued after the expiration of the term without new articles being entered into, it becomes a partnership at will; and such only of the articles as are applicable to a partnership at will remain in force. (*p*) Temporary illness or incapacity to transact business will not warrant an application to the court for the dissolution of such a partnership; but, if the illness or incapacity is long continued, or recovery appears to be hopeless, a dissolution will be decreed. (*q*) Actual insanity of one partner is not in itself a dissolution of the partnership; but it is a good ground for a decree of dissolution. (*r*) The partnership is dissolved by the death or insolvency of one of the partners, or by an act of bankruptcy followed up by adjudication, and also by assignment by any partner of his share and interest in the business. And a dissolution by one partner is a dissolution as to all; so that the affairs of the old concern must be wound up from the day of the retirement. (*s*) If the deed of co-partnership contains a power of expulsion of any one or more of the partners upon certain contingencies, the power must be exercised with

(*o*) *Smith v. Mules*, 9 Hare, 556.
Essell v. Hayward, 29 L. J., Ch. 807;
 30 Beav. 158. *Harrison v. Tennant*,
 21 Beav. 482.

(*p*) *Clark v. Leach*, 32 Beav. 14;
 32 L. J., Ch. 290.

(*q*) *Leaf v. Coles*, 1 De G. M. & G.

174. *Whitwell v. Arthur*, 35 Beav.
 140.

(*r*) Anqn., 2 K. & J. 441. *Rowlands v. Evans*, 30 Beav. 302; 31 L.
 J., Ch. 265.

(*s*) *Collier on Partnership*, 68-75

154.

the most perfect good faith and fairness, and in strict conformity with the stipulations and provisions of the deed, every opportunity being given to the expelled partner to bring to the knowledge of his co-partners all the facts and circumstances necessary to enable them to make a just exercise of their power. (*t*) A dissolution which is fraudulent as against the joint creditors may be avoided. (*u*) When a partnership is determined prematurely, if the incoming partner has paid a premium, he is entitled to have a proportionate part of the premium returned, except, first, where there has been an actual or implied release or waiver of the right to it ; or secondly, where there has been an actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether. (*x*) Where, therefore, the partner who has received the premium afterwards commits a breach of the partnership articles and dissolves the partnership, the court will not allow him to take advantage of his own wrong, but will decree a restitution of a portion of the premium paid ; but, if the partner who has paid the premium commits a breach and dissolves the partnership, the court will not allow him to found a claim to the restitution of the premium upon his own wrongful act. (*y*) On a bill to dissolve a partnership, and take the usual partnership accounts, although the partnership had been discontinued more than six years before the filing of the bill, the court directed the accounts to be taken, notwithstanding that the defendant insisted on the Statute of Limitations as a bar. (*z*)

(*t*) *Blisset v. Daniel*, 10 Hare, 493.

Eq. 606 ; 42 L. J., Ch. 668.

(*u*) *Ex parte Mayou*, 34 L. J., Bank.

(*y*) *Atwood v. Maude*, L. R., 3 Ch.

25.

369.

(*x*) *Wilson v. Johnstone*, L. R., 16

(*z*) *Miller v. Miller*, L. R., 8 *Eq.* 499.

1313. *Distribution of the partnership property and effects.*—If a house in which the partnership trade is carried on belongs to one of the co-partners, the right to the occupation of the premises by the other partners ceases as soon as the firm is dissolved, unless the house has been demised to the firm collectively. (a) Upon the dissolution of a mercantile partnership by death of one of the partners, the property and effects of the co-partnership do not belong exclusively to the survivors, but to the survivors and the representatives of the deceased partner, and are distributable between them in the same manner as they would have been by dissolution of the partnership *inter vivos*. The surviving partners have no *jus disponendi* of the partnership property and effects, as against the personal representatives of the deceased, except for the purpose of paying debts due from themselves and the deceased at the time of the death of the latter. They can not mortgage the share of the deceased together with their own shares of the partnership property to enable them to pay debts and continue the trade; (b) but they may become purchasers of the share of the deceased partner from his personal representatives. (c) If partners have purchased land merely for the purpose of carrying on their trade, and have paid for the land out of the partnership funds, the transaction makes the land partnership property, and the court will deal with it as personalty, and the share of a deceased partner therein will pass to his personal representatives. (d) But, where the land, and not the trade, is the principal object, and the trade is merely ancillary to the benefi-

(a) *Benham v. Gray*, 5 C. B. 141.(c) *Chambers v. Howell*, 11 Beav.(b) *Buckley v. Barber*, 6 Exch. 180; 6.

20 L. J., Ex. 117.

(d) *Darby v. Darby*, 3 Drew, 495;

25 L. J., Ch. 371.

ficial enjoyment of the land, this doctrine will not apply. (*e*) Partnership stock includes the good-will of the business and the right to use the trade-mark; and, on the purchase of a surviving partner from the executors of a deceased partner of the partnership stock at a valuation, the value of the good-will and of the trade mark must be taken into account. (*f*) In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed. (*g*) Nor in the absence of special agreement will interest be allowed on the profits left by a partner in the business. (*h*)

1314. *Use of the name of the firm after dissolution.*—After a partnership has been dissolved, each partner is entitled, in the absence of express agreement, to carry on business in the name of the old firm. (*i*)

SECTION II.

OF JOINT STOCK COMPANIES.

1315. *Joint stock companies.*—The rights inter se of the members of a joint-stock company are regulated by the joint-stock companies' Acts and by the memorandum and articles of association.¹ Where these are silent the ordinary law of partnership applies.

- (*e*) *Stewart v. Blakeway*, L. R., 6 R., 8 Ch. 1; 42 L. J., Ch. 179.
 Eq. 479; *Ib.* 4, Ch. 603. (*h*) *Dinham v. Bradford*, L. R., 5
 (*f*) *Hall v. Burrows*, 33 L. J., Ch. Ch. 519.
 204. (*i*) *Banks v. Gibson*, 34 L. J., Ch.
 (*g*) *Barfield v. Loughborough*, L. 591; 34 Beav. 566.

¹ Section 10, article 1, of the Constitution of the United States provides that "no state shall . . . pass . . . any law impairing the obligation of contracts. This clause, which

1316. *General duties of directors.*—There is, by law, without any special provision for the purpose, an implied and inherent term of the engagement or rela-

became obligatory upon the states (but not upon the general government; *Evans v. Evans*, Pet. C. C. 322), and applicable to all laws passed, or to be passed, by them after the first Wednesday in March, 1789 (*Owings v. Speed*, 5 Wheat. 420), is mainly vital in reference to grants, franchises, and charters bestowed by the states upon corporations of their own creation, especially as to the question whether, once having bestowed them, the states in their control over the corporations thus created can impair or in any way tamper with them. A grant to a corporation is now understood to be a contract within this section; and said MARSHAL, J.: "The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice." (*Dartmouth College v. Woodward*, 4 Wheat. 518). "Therefore, the grant of lands by the legislature of a state, constitutionally empowered to make it, can not be revoked by its successor." (*Fletcher v. Peck*, 6 Cranch, 87, 136.) "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says BLACKSTONE, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues; and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property

tionship subsisting between directors and shareholders that directors shall use their best exertions in all matters relating to the affairs of the company, that they

from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of this provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state." *Dartmouth College v. Woodward*, 4 Wheat. 656; and see *Rehoboth v. Hunt*, 1 Pick. 224; *Lowry v. Francis*, 2 Yerg. 534; *Butler v. Chariton County Court*, 13 Mo. 112. A state can not revoke a grant made to a corporation. *Terrett v. Taylor*, 9 Cranch, 43; *Wilkinson v. Leland*, 2 Pet. 657; see *Den d. University of North Carolina v. Foy*, 1 Murph. 58; *Winter v. Jones*, 10 Ga. 190; *Planters Bank v. Sharp*, 6 How. 301, 327. The charter of a railway company is a contract between the people of the state granting it, and the company, and comes within the clause of the constitution of the United States, which declares that no state may pass a law impairing the obligation of contracts. Any act of a legislature which impairs, by restricting or abridging, any powers granted thereby, a charter once granted, impairs the obligation of a contract, and is unconstitutional. The

shall not make any profit to themselves out of their trust or employment, and that they shall not acquire to themselves whilst they remain directors, any inter-

power of a railway company to charge for the moving of passengers and freight over its lines is presumed to be the consideration for which the incorporators of a railway accept its charter from the state, build its roadway and invest capital in its furniture and equipment. Such power is essential to their enjoyment of the franchise, and the power to adjust their tariff of charges without legislative control, being a part of their franchise. Any attempt of the legislature to interfere with this right is unconstitutional and void. The legislature of a state may at all times regulate the exercise of a franchise by general laws, passed for all legitimate ends contemplated by the general power of the state, but it can not, under color of such laws, impair or destroy the obligation of a contract. *Clark v. Philadelphia, &c., R. R. Co.*

The leading case under this clause was the celebrated Dartmouth College case above referred to, argued for the college in the superior court of the United States by Daniel Webster. Dartmouth College was chartered by the British Crown before the Revolution, and upon an attempt to interfere with its franchise by the state government, the defendant insisted that except in so far as affected by the legislation of parliament of the colonies, before the adoption of the constitution such a charter was a contract within the clause, and that civil rights were not destroyed by the Revolution. The court sustained this view, and held substantially that an eleemosynary corporation, founded by private contributions for the distribution of a general charity, is not an instrument of government, whose officers are public officers, but a private corporation, whose charter is a contract between the donors and its trustees and the government itself, the consideration for which is the public benefit to be derived from the corporation, and that this contract is one which can not be altered, amended, or modified by the state without the consent of the corporation. This case has been followed and universally recognized as authority since its decision. See *Dawson v. Godfrey*, 4 Cranch, 323; *Society, &c. v. New Haven*, 8 Wheat. 464; *Trustees of Vincennes University v. Indiana*, 14 How. 268; *Norris v. The Trustees of Abingdon Academy*, 7 Gill & J. 7; *Grammar School v. Burt*, 11 Vt. 632; *Brown v. Hummel*, 6 Barr. 86; *Terrett v. Taylor*, 9 Cranch, 43; Stat

est adverse to their duty. (*k*) But their duty as directors may be controlled and qualified by the rules and objects of the society, and the nature and extent

(*k*) *Benson v. Heathorn*, 1 Y. & C. Beav. 360. *Gt. Luxembourg Rail. Ch. C.* 341. *Gaskell v. Chambers*, 26 Co. v. Magnay, 25 Ib. 586.

v. Hayward, 3 Rich. 389. In *Toledo Bank v. Bond*, 1 Ohio St. 669, the court maintained that the supreme court in the *Dartmouth College* case did not hold that all franchises and charters granted by governments were contracts, but that under the peculiar circumstances of the case a contract had been created, with which the state attempted to interfere, but this view does not seem to have prevailed further. In *Washington Bridge Co. v. State*, 18 Conn. 53, it was held that no conditions or reservations other than what are expressed in the charter of an incorporation can be forced upon it by the legislature against its will. The franchise must be, indeed, construed strictly as against the grantor, but not to any prospective benefits which may possibly accrue from the grant. For instance, it has been held that nothing passes by implication, and that where a state legislature granted a charter to a company for the building of a bridge over a river, and taking tolls of persons passing over it, for the term of forty years, extended by a subsequent act to seventy years, and some thirty-three years before the expiration of the charter, authorized the erection of another bridge, a few rods from the former, which was to become free in six years, thereby reducing the tolls of the first bridge to a very small amount, the grant of franchises by the public, in matters where the public interests are concerned, as exemption from taxation and the right of the state to open new roads and construct new bridges, are to be construed strictly, and that no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, convey; and that as the charter, in its terms, granted no exclusive rights above and below the bridge, and contained no stipulation, on the part of the state, not to authorize another bridge above or below it, no such exclusive right of the plaintiff company could be implied. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. This doctrine is followed in *Mohawk Bridge v. Utica, &c.*, R. R. Co., 6 Paige, 554; *Oswego Falls Bridge v. Fish*, 1 Barb. Ch. 547; *Thompson v. N. Y., &c.*, R. R. Co., 3 Sandf. Ch. 625; *Washington, &c., Turnpike Co. v. Baltimore & Ohio R. R. Co.*, 10 Gill.

of the authority delegated to them by their shareholders. (1)

1317. *Liabilities of directors.*—If the directors

(1) *Bluck v. Mallalue*, 27 Beav. 404.

& J. 392; *Harrison v. Young*, 9 Ga. 359; *McLeod v. Burroughs*, Id. 213; *Shorter v. Smith*, Id. 517; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40, 454; *Miners' Bank v. United States*, 1 Greene (Iowa) 553; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *West River Bridge v. Dix*, 6 How. 532, 16 Vt. 446; *White River Turnpike Co. v. Vermont, &c., R. R. Co.*, 21 Vt. 590; *Tuckahoe R. R. Co. v. Tuckahoe R. R. Co.*, 11 Leigh, 42. This is what constitutes the law of eminent domain. *Beekman v. Saratoga, &c., R. R. Co.*, 3 Paige, 72; *West River Bridge Co. v. Dix*, 6 Howe, 532; *Enfield Toll Bridge Co. v. Hartford, &c., R. R. Co.*, 17 Conn. 61. And the franchise of a corporation may be taken by the state for public uses, or such power delegated by the state to another corporation, on providing compensation. *Boston Water Power Co. v. Boston, &c., R. R. Co.*, 23 Pick. 360; *Armington v. Barnet*, 15 Vt. 745; *White River Turnpike Co. v. Vt. Central R. R. Co.*, 21 Id. 590; *Barber v. Andover*, 8 N. H. 398; *Pierce v. Somersworth*, 10 Id. 369; *Backus v. Lebanon*, 11 Id. 19; *Rogers v. Bradshaw*, 20 Johns. 725; *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige, 45; *Lexington and Ohio R. R. Co. v. Applegate*, 8 Dana, 289; *Boston Water Power Co. v. Boston and Worcester R. R. Co.*, 23 Pick. 360; *West River Bridge Co. v. Dix*, 6 How. 507; *Shorter v. Smith*, 9 Ga. 529; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Enfield Toll Bridge Co. v. Hartford, &c., R. R. Co.*, 17 Conn. 41, 454; *Richmond, &c., R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; *Northern R. R. v. Concord, &c., R. R. Co.*, 7 Fost. 183. A state of which a railroad company was a creation, had in its constitution a provision to the effect that every stockholder in a corporation should be "individually liable for its debts over and above the stock owned by him" in a sum at least equal in amount to such stock. The railroad company having become indebted, was authorized to obtain subscriptions for additional stock. After such authorization, but before proceeding to obtain the subscriptions, the constitution of the state was amended so as to declare that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him." *Held*, that

exceed their powers, or appropriate the funds of the company in a way not authorized by the articles of association or the deed of settlement, they are bound

such amended constitution is not a law impairing the obligation of a contract, and that neither the law nor his contract makes the defendant liable for the debts of the company beyond the amount of its stock. *Ochiltree v. R. R. Co.*, 7 Am. Railway Rep. 525. Political powers conferred by a state upon a collection of individuals forming a municipal corporation, may be revoked. *People v. Morris*, 13 Wend. 325; *Miers v. Williams*, 11 Ired. 558; *Trustees v. Tatman*, 13 Ill. 27; *Marietta v. Fearing*, 4 Ohio St. 427; *Terrett v. Taylor*, 9 Cranch, 43; *Bush v. Shipman*, 4 Scam. 186; *Bradford v. Cary*, 5 Greenl. 339. And public property rights and duties may be regulated by a state without its coming within the provisions of the section. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. *Dartmouth College v. Woodward*, 4 Wheat. 518; and see *Toledo Bank v. Bond*, 1 Ohio St. 657; *Kroup v. Piqua Bank*, Id. 603. But private property or franchises, once granted to a municipal corporation, can not be divested. *Hayen v. Union Bank of Tennessee*, 1 Sneed. 115; *Terrett v. Taylor*, 9 Cranch, 43; *Bailey v. Mayor, &c.*, 3 Hill 531; *Town of Pawlett v. Clark*, 9 Cranch, 292; *Dartmouth College case*, cited *ante*. Although the state may from time to time provide laws to secure due and proper exercise of the franchise, and to prevent its abuse, as, for instance, where a municipal corporation has been endowed with a franchise to maintain ferries, such franchises are in the nature of private property, and if operated and used by the corporation they can not be resumed by the state; but the state is not excluded from legislation touching them, so far as they are *publici juris*, and it may pass laws to secure the safety of passengers and protect them from imposition, and otherwise to regulate the due and lawful exercise and enjoyment of the franchise. *Benson v. Mayor, &c., of New York*, 10 Barb. 223; but see *East Hartford v. Hartford Bridge Co.*, 10 How. 511; 17 Conn. 79. Anything in the shape of property which the state, by its grant or sanction has alienated from itself and given to individuals, it seems—it can not divest them of; but the salary and tenure of a public office is not property, and a state may alter or annu!

to make good out of their own pockets the full amount of money misappropriated or of loss caused by their negligence. (*m*)

(*m*) *Grimes v. Harrison*, 28 L. J., Brown, L. R., 8 Eq. 396. *Land Ch. 827. Turquand v. Marshall*, L. Credit Co. of Ireland v. Lord Fermoy, R., 6 Eq. 112; 4 Ch. 376; 38 L. J., L. R., 5 Ch. 763; 39 L. J., Ch. 477. Ch. 639. *Joint Stock Discount Co. v.*

them at its pleasure. See *Knoup v. Piqua Bank*, 1 Ohio St. 616; *Commonwealth v. Bacon*, 6 D. & R. 322; *Warner v. The People*, 2 Denio, 272; *Conner v. The City of New York*, 2 Sandf. 355, 1 Sel. 285; *Toledo Bank v. Bond*, Id. 656; *Commonwealth v. Mann*, 5 Watts & S. 418; *Barker v. Pittsburg*, 4 Barr. 51; *West River Bridge Co. v. Dix*, 6 How. 548. A state legislature passed a law providing that canal commissioners should be appointed annually by the governor, their term of office to commence on the first of February in every year, and their pay to be four dollars per diem. Seven years after the law was passed, certain persons being then in office as such canal commissioners, the legislature passed another law, providing, amongst other things, that the per diem should be only three dollars, the reduction to take effect upon the passage of the law; the law further provided that in the following October, these commissioners should be elected by the people instead of being appointed by the governor. Upon the commissioners resisting the effect of the new law, and claiming their per diem allowance for the entire year, upon the ground that the state had no right to pass a law impairing the obligation of a contract, the court held that there was no contract between the state and the commissioners within the meaning of the constitution of the United States. "The contracts," said the court, "designed to be protected by the 10th section of the first article of that instrument, are contracts by which perfect rights, certain, definite, fixed, private rights of property are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government, for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any

1318. *Of the amalgamation of companies.*—A contract for the amalgamation of two joint-stock companies is ultra vires and void, unless the deeds of set-

obligation to continue such agents, or to re-appoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest, necessarily, everything like progress or improvement in government; or, if such changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a state, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community." *Butler v. Pennsylvania*, 10 How. 48; and see *Allen v. McKeen*, 1 Sumner, 276; *Whilington v. Polk*, 1 Harris & J. 236. This latter was an action on an assize sur novel disseisin, to maintain the right of a judge to his seat after the court had been destroyed by a statute repealing that under which the judge was appointed. So it has been held that a chartered bank is a public corporation, appointed for public purposes, subject to the control of the public, the charter of which is held at the pleasure of the sovereign power, its creation proceeding solely upon the idea of public necessity or public convenience, and that, being appointed by the public, solely for public uses, all its operations are subject to the control of the public, who may, from time

tlement of both companies contain special powers for the purpose. (n) The directors of the one company have no power to burden their shareholders with the debts and liabilities of the other company, (o)

(n) *Cork, &c., Rail. Co. v. Patterson*,
18 C. B. 450.

(o) *Eva Ins. Co., in re*, 30 L. J., Ch.
137. *Harding v. Webster*, 29 L. J.,
Ch. 161.

to time, as the public good may require, enlarge, restrain, limit, modify its powers and duties, and at pleasure dispense with its benefits. The agency, during its continuance, is equally independent, within its sphere, and upon a modification of its terms the agency may be surrendered. The rights of the agent to the profits and emoluments of the agency will be enforced by courts; but, like every other agency, it is revocable at the will of the principal. *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio St. 591; *Toledo Bank v. Bond*, Id. 622; *Knoup v. The Piqua Bank*, Id. 603, 609; and see *Butler v. Palmer*, 1 Hill, 324. If a bank has, by its charter, an express or implied power to sell and transfer negotiable paper, a law taking away this power impairs the obligation of a contract, and is void. *Planters' Bank v. Sharp*, 6 How. 301; *The People v. Manhattan Co.*, 9 Wend. 351; *Michigan State Bank v. Hastings*, 1 Doug. 225; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Bank of the State v. Bank of Cape Fear*, 13 Ired. 75; *Providence Bank v. Billings*, 4 Pet. 560; *Turnpike Co. v. Phillips*, 2 Penn. 184; *Claghorn v. Cullen*, 13 Penn. St. 133; *Com. Bank of Natchez v. The State of Mississippi*, 6 Sm. & Mar. 599; *Backus v. Lebanon*, 11 N. H. 19; *Stanley v. Stanley*, 26 Me. 191; *Williams v. Planters' Bank*, 12 Rob. (La.) 125; *Payne v. Baldwin*, 3 Sm. & Mar. 661. The question as to the taxing power arises under this clause of the constitution. So a provision in the charter of a railroad company, or an act of a state legislature consolidating two railroad companies, which requires the new company to pay annually into the treasury of the state a tax of one quarter of one per cent. upon its capital stock of four hundred thousand dollars, does not prevent a subsequent legislature of the state imposing a further or different tax upon the company. The amount designated in the first act is to be considered as only a declaration of the tax, payable annually until a different rate should be established, though if a state should expressly and unmistakably confer immunity from taxation upon a corporation

1319. *Injunction to restrain unauthorized contracts.*—It is competent to any single shareholder to apply for and obtain an injunction for the purpose of

in its charter, such immunity would undoubtedly become a part of the contract, and equally inviolate with its other stipulations; but before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond reasonable doubt. All public grants are strictly construed, and nothing can be taken against a state by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are to be understood as reserved. *Minot v. Philadelphia, &c., R. R. Co.*, 18 Wall. 206. Upon questions of public policy, such as the granting to an individual or a company a franchise to raise a certain sum of money by lotteries, or to sell spirituous liquors for a certain period, and afterwards by a general law prohibiting lotteries or the sale of spirituous liquors. The prevailing opinion seems to be that such general laws are not, in either case, within the clause. *Vanderbilt v. Adams*, 7 Cowen, 349; *Coates v. The Mayor, &c., of New York*, Id. 585; *Phalen's case*, 1 Rob. (Va.) 713; *Phalen v. Virginia*, 8 How. 263; *Hirn v. State*, 1 Ohio, 15; *Baker v. Boston*, 12 Pick. 194. It was held in *State v. Hawthorn*, 9 Mo. 389, that where a premium has been paid for the license, the contract is one which state laws can not impair. See *Freleigh v. State*, 8 Id. 606; *State v. Sterling*, Id. 697; *State v. Phalen*, 3 Harring. (Del.) 441. Sec. 8, subd. 3, of the constitution provides that congress shall have power to regulate commerce between the states. This is what is known as the commercial power of congress. Under this clause many important questions have arisen. Thus it has been held, by the supreme court that power to regulate commerce between the states was vested in congress by the constitution in order to remove trammels upon transportation between different states which had previously existed, and to prevent the creation of such trammels in future, and that the act of July 25, 1866, authorizing the construction of certain bridges across the Mississippi river, and among others, a bridge connecting Dubuque with Dunleith, in the state of Illinois, were intended to reach trammels to such commerce interposed by state enactments or by existing laws of congress. But they were not intended, even if it were competent for congress to authorize any such proceeding, to invade the

preventing the directors and the majority of shareholders of a registered company from entering into contracts for the carrying on a trade or business and

domain of private contracts and annul all such as had been made on the basis of existing legislation and existing means of international communication. Contracts valid when made, continue valid, so long, at least, as peace exists between the governments of the contracting parties, notwithstanding a change in the condition of business which originally led to their creation. Therefore, a contract between an elevator and a railway company, that the former, in consideration of erecting an elevator-building at a certain point where grain brought in by the latter's road would have to be re-shipped across the Mississippi river, should have the handling of such grain, did not cease to be binding, or the building of a bridge across the river at that point, which obviated all necessity of such re-shipment. *R. R. Co. v. Richmond*; and see *Minot v. Philadelphia, &c., R. R. Co.*, 18 Wall. 206. The question has further arisen in consideration of whether a state which is traversed by a railroad, whose termini are beyond its limits, has a right to assess a tax upon passengers carried from one state to another, through the state levying the tax. In *Clark v. Philadelphia, &c., R. R. Co.*, 4 Houst. 158, the supreme court of the United States held, that an act of the legislature imposing on "every person, corporation or association or company of persons not a corporation, engaged, or that may hereafter engage in the business of carrying passengers by steam-power, whether on land or water, in, through upon, over, or across any portion [of a] state, or within the territorial limits of it," a state tax "at and after the rate of ten cents for every passenger so transported within this state," to be paid to the state treasurer, for the use of the state; and further providing that "in case there be in the charter of any corporation liable to the provisions of the act, any clause or provision so restricting the amount of toll to be charged for the transportation of passengers, as that the act would, according to the present rate of charges of such corporation, operate unjustly, then . . . the said corporation shall have the right to increase the said toll to the amount of said tax;" and also providing that "when the transportation of a passenger shall be by railroad, and the direction and length of his journey shall be such as to require him to travel on more than one road on the same occasion, there shall be but

the accomplishment of objects not warranted by the articles of association. (*p*)

1320. *The dissolution and winding up of regis-*

(*p*) *Simpson v. Westm. Pal. Hotel Co. (Limited)*, 29 L.J., Ch. 561; 8 H. L. C. 712.

one tax paid to the state treasurer, and that shall be paid by the person, association, company, or corporation upon whose road his journey begins"—is an act which imposes the tax upon the passengers so transported, to be collected by the railroad company or other carrier for the state, and not a tax upon the carrier, to be measured by the number of passengers carried, and in so far as it affects persons entering into, leaving, or passing through a state, is in effect an act to regulate commerce between the states, and, therefore, inoperative and invalid under the provision of the constitution of the United States conferring on congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." A question also arises under this clause as to the legality of state laws imposing per-centages or head moneys upon emigrants, or upon companies transporting them to its limits. In the supreme court of the United States, October term, 1875, an appeal from the circuit court for the southern district of New York, in *Henderson v. Wickham, mayor, &c., of New York*, and the *Commissioners of Emigration v. North German Lloyd*, Mr. Justice MILLER reviews the preceding decisions in an opinion which settles the question, we suppose, finally. Said he: "In the case of the *City of New York v. Miln*, reported 11 Peters, 103, the question of the constitutionality of a statute of the state of New York, concerning passengers in vessels coming to the port of New York, was considered by this court. It was an act passed February 11, 1824, consisting of several sections. The first section—the only one passed upon by the court—required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other state of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and on

tered joint stock companies are regulated by the 25 & 26 Vict. c. 89. (q) In order to bring a society or association within the operation of the Act, it must be

(q) See also the 31 & 32 Vict. c. 68, and the 33 and 34 Vict. c. 104.

all persons landed from the ship or put on board, or suffered to go on board any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported. The other sections required him to give bond, on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger deemed liable to become a charge, to his last place of settlement, and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and the name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the circuit court on the question whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void. This court, expressly limiting its decision to the first section of the act, held that it fell within the police powers of the states, and was not in conflict with the federal constitution. From this decision Mr. Justice STORY dissented, and in his opinion stated that Chief Justice MARSHALL, who had died between the first and second arguments of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the states. In the *Passenger Cases*, reported in 7 Howard, 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commissioner to demand, and if not paid, to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the

shown that it was formed for the purpose of trading and making profit. Clubs, therefore, in the ordinary acceptation of the term, are not within the scope and

master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital. The defendant, Smith, who was sued for the sum of \$295 for refusing to pay for 295 steerage passengers on board the British ship *Henry Bliss*, of which he was master, demurred to the declaration on the ground that the act was contrary to the constitution of the United States, and void. From a judgment against him, affirmed in the court of errors of the state of New York, he sued out a writ of error, on which the question was brought to this court. It was here held, at the January term, 1849, that the statute was 'repugnant to the constitution and laws of the United States, and therefore void.' 7 Howard, 572. Immediately after this decision, the state of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection, and amendments and alterations have continued to be made up to the present time. As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of *New York v. Miln*, and on this report the mayor is to endorse a demand upon the master or owner that he give a bond for every passenger landed in the city in the penal sum of \$300, conditioned to indemnify the commissioners of emigration and every county, city, and town in the state against any expense for the relief or support of the person named in the bond for four years thereafter. But the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of \$500 is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the commissioner of emigration. Conceding the authority of the *Passenger Cases*, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon, requiring primarily a bond for each passenger landed as an indemnity against his becoming a future charge to the state or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger

operation of the statute ; (r) but benefit building societies and friendly societies have been held to be within the repealed Acts for which the 25 & 26 Vict. c. 89, is substituted. (s)

(r) St. James's Club, *in re*, 2 De. G. Soc., *in re*, 27 L. J., Ch. 97. Nat. M. & G. 388. Indust. & Prov. Soc., *in re*, 30 L. J.,

(s) St. George's Benefit Building Ch. 940. Mid. C. Ben. Build. Soc. *in re*, 33 L. J. Ch. 739.

takes it out of the principle of the case of *Smith v. Turner*—the Passenger Case from New York. It is said that the statute in that case was a direct tax on the passenger, since the act authorized the ship-master to collect it of him ; and that on that ground alone was it held void ; while in the present case, the requirement of the bond is but a suitable regulation under the power of the state to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect ; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers, if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases. To require a heavy and almost impossible condition to the exercise of this right, with the alternative of the payment of a small sum of money, is in effect to demand payment of that sum. To suppose that a vessel which once a month lands from 300 to 1,000 passengers, or from 3,000 to 12,000 per annum, will give that many bonds of \$300 with good sureties, with a covenant for four years against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of \$1.50, collected of the passenger before he embarks on the vessel. Such bonds would amount in many instances for every voyage to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsmen could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as

1321. *Parties liable to be made contributories.*—By the 25 & 26 Vict. c. 89, s. 74, the term “contributory” is to mean every person liable to contribute to

commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries. It is said that the purpose of the act is to protect the state against the consequences of the flood of pauperism immigrating from Europe and first landing in that city. But it is a strange mode of doing this to tax every passenger alike who comes from abroad. The man who brings with him important additions to the wealth of the country, who is perfectly free from disease, and the man who brings to aid the industry of the country a stout heart and a strong arm, is as much the subject of the tax as the diseased pauper who may become the object of the charity of the city in a week after he lands from the vessel. No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel. So far as the authority of the cases of *New York v. Miln*, and the *Passenger Cases*, can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence and other matters of that character, is a proper exercise of state authority, and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the constitution and laws of the United States. But the *Passenger Cases* (so called because a similar statute of the state of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLEAN, WAYNE, CATRON, McKINLEY, and GRIER held both statutes void; while Chief Justice TANEY and Justices DANIEL, NELSON, and WOODBURY held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge NELSON, none of them professing to be the authoritative opinion of the court. Nor is there to be found in the reason given by the judges who constituted the majority such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before

the assets of a company under that Act in the event of the same being wound up. By s. 75 the liability of any person to contribute to the assets of a

us arising under statutes of three different states on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors. As already indicated, the provisions of the constitution of the United States on which the principal reliance is placed to make void the statute of New York, is that which gives to congress the power 'to regulate commerce with foreign nations.' As was said in *United States v. Holliday*, 3 Wall. 417, 'commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments.' It means trade and it means intercourse. It means commercial intercourse between nations and parts of nations in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. 'The mind,' says the great Chief Justice, 'can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another,' and he might have added with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons v. Ogden*, 9 Wheaton, 190. Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportions at that time to other branches of commerce. It has become a part of our commerce with foreign nations of vast interest to this country as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch

company under that Act, in the event of the same being wound up, is to be deemed to create a debt of the nature of a specialty accruing due

of commerce? The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can discharge its passengers is a regulation of commerce, and in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations. The accuracy of these definitions is scarcely denied by the advocates of the state statutes. But assuming that in the formation of our government certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order by punishment of crime, of the health and comfort of the citizens, and their protection against pauperism, and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the states. This power, frequently referred to in the decisions of this court, has been in general terms somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution. Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency, and the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable. But however difficult this may be, it is clear from the nature of our complex form

from such person at the time when his liability commenced, but payable at the time when calls are made for enforcing such liability. By s. 38, in the event of

of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no difference under what class of powers it may fall, or how closely allied to powers conceded to belong to the states. 'It has been contended,' says MARSHALL, C. J., 'that if a law passed by a state in the exercise of its acknowledged sovereignty comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject and each other like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself but of the laws made in pursuance thereof. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is supreme.' And where the federal government has acted, he says: 'In every such case the act of congress or the treaty is supreme; and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it.' 9 Wheaton, 210. It is said, however, that under the decisions of this court there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of congress or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the Passenger Cases, by the decisions of this court in *Cooly v. Board of Wardens*, 12 How. 299, and by the case of *Crandall v. Nevada*, 6 Wall. 35, and *Gilman v. Philadelphia*, 3 Wall. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the constitution, or within its compass, there are powers which, from their nature, are exclusive in congress; and in the case of *Cooly v. Board of Wardens* it was said that, 'whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress.' A regulation which imposes onerous, perhaps impossible, conditions, on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is

a company under that Act being wound up, every present and past member of the company is to be liable to contribute to the assets of the company to an

more than this, for it may properly be called international. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the president and senate by the constitution. It is, in fact, in an eminent degree a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected whether the rule be established by treaty or by legislation. It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, almost identity, of the statutes of New York, of Louisiana, and California, now before us for consideration in these three cases. It is apparent, therefore, that if there be a class of laws which may be valid when passed by the states, until the same ground is occupied by a treaty or an act of congress, this statute is not of that class. The argument has been pressed with some earnestness, that inasmuch as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with or has the right to mingle with the mass of the population, he is withdrawn from the influence of any laws which congress might pass on the subject, and remitted to the laws of the state as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection which the foreigner has a right to expect from the federal government when he lands here a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government. But the branch of the statute which we are considering is directed to and operates directly on the ship-owner. It holds him responsible for what he has done before the twenty-four hours commences. He is to give the bond or pay the money, because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches.

amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such

When he is sued for this penalty, it is not because the man has been here twenty-four hours, but because he brought him here and failed to give the bond or pay \$1.50. The effective operation of this law commences at the other end of the voyage. The master requires of the passenger before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said in effect, a tax on the passenger, which he pays for the right to make the voyage, a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the constitution, laws, and treaties of the United States, and becomes subject to such laws as the state may rightfully pass, as was the case in regard to importations of merchandise, in *Brown v. Maryland*, 12 Wheaton, 417, and in *The License Cases*, 5 How. 504. It is too clear for argument that this demand of the owner of the vessel for a bond or money on account of every passenger landed by him from a foreign shore is, if valid, an obligation which he incurs by bringing the passenger here, and which is perfect the moment he leaves the vessel. We are of opinion that this whole subject has been confided to congress by the constitution; that congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled. Whether, in the absence of such action, the states can, or how far they can, by appropriate legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes are not properly before us, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given in this bill. The decree of the circuit court of New York in the case of *John & Thomas Henderson v. The Mayor of New York and the Commissioners of Emigration*, is reversed, and

sums as may be required for the adjustment of the rights of the contributories amongst themselves. But no past member is to be liable to contribute to the

the case remanded, with direction to enter a decree for an injunction, in accordance with this opinion. The statute of Louisiana, which is involved in the case of the Commissioners of Immigration v. North German Lloyd is so very similar to, if not an exact copy of, that of New York, as to need no separate consideration. In this case the relief sought was against exacting the bonds or paying the commutation money as to all passengers, which relief the circuit court granted by an appropriate injunction; and the decree in that case is accordingly affirmed at the same term, in *Chy Lung, plaintiff in error, v. J. H. Freeman, R. K. Piotrowski, Commissioner of Immigration, and William McKibben, sheriff of the city and county of San Francisco, California*. In error to the supreme court of the state of California. The California statute relating to the landing of passengers was declared unconstitutional. Said MILLER, J.: 'While this case presents for our consideration the same class of state statutes considered in the cases just disposed of, it differs from them in two very important points. These are, first: The plaintiff in error was a passenger on a vessel from China, being a subject of the Emperor of China, and is held a prisoner because the owner or master of a vessel who brought her over refused to give a bond in the sum of five hundred dollars in gold, conditioned to indemnify all the counties, towns, and cities of California against liability for her support or maintenance for two years. Secondly, the statute of California, unlike those of New York and Louisiana, does not require a bond for all passengers landing from a foreign country, but only for classes of passengers specifically described, among which are 'lewd and debauched women,' to which class, it is alleged, plaintiff belongs. The plaintiff, with some twenty other women, on the arrival of the steamer Japan from China, was singled out by the commissioner of immigration, an officer of the state of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law, before he permitted them to land. This he refused to do, and detained them on board. They sued out a writ of habeas corpus, which, by regular proceedings, resulted in their committal, by order of the supreme court of the state, to the custody of the sheriff of the county and city of San Francisco

assets of the company, if he has ceased to be a member for one year prior to the commencement of the winding-up. No past member is to be liable to con-

to await the return of the Japan, which had left the port pending the progress of the case, the order being to remand them to that vessel on her return, to be removed from the state. All of plaintiff's companions were released from the custody of the sheriff on a writ of habeas corpus issued by Mr. Justice FIELD of this court. But plaintiff, by a writ of error, brings the judgment of the supreme court of California to this court, as we suppose, for the purpose of testing the constitutionality of the act under which she is held a prisoner. We regret very much that while the Attorney General of the United States has deemed the matter of such importance as to argue it in person, there has been no argument in behalf of the state of California, the commissioner of immigration, or the sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner, nor have we been furnished even with a brief in support of the statute of that state. It is a most extraordinary statute. It provides that the commissioner of immigration is "to satisfy himself whether or not any passenger who shall arrive in the state by vessels from any foreign port or place, (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease, existing either at the time of sailing from the port of departure, or at the time of his arrival in the state, a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master, or owner, or consignee shall give a separate bond in each case, conditioned to save harmless every county, city, and town of the state against any expense incurred for the relief, support, or care of such person for two years thereafter. The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him, which sum he may collect of the master, owner, or consignee, or of the vessel by attachment. The bonds are to be prepared by the commissioner, and two sureties are required to each bond, and for preparing the bond the commissioner is allowed to charge and collect a fee of three dollars, and for each oath administered

tribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. No past member is to be liable to con-

to a surety, concerning his sufficiency as such, he may charge one dollar. It is expressly provided that there shall be a separate bond for each passenger, that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond, and they must in all cases be residents of the state. If the ship master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may in each case think proper to exact, and after retaining twenty per cent. of the commutation money for his services, the commissioner is required once a month to deposit the balance with the treasurer of the state. See chapter I., article VII., of the Political Code of California, as modified by section 70 of the amendments of 1873-4. It is hardly possible to conceive a statute more skillfully framed to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind. The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial, or hearing, or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, he points with his finger to twenty, as in this case, or a hundred if he chooses, and says to the master, these are idiots, these are paupers, these are convicted criminals, and these are lewd women, and these others are debauched women. I have here an hundred blank forms of bonds printed. I require you to fill me up and sign each of these for five-hundred dollars in gold, and that you furnish me two hundred different men, residents of this state, and of sufficient means, as sureties on these bonds. I charge you five dollars in each case for preparing the bond and swearing your sureties, and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this you are forbidden to land your passengers under a heavy penalty. But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer, but you must remember that twenty per cent. of all I can get out of you goes into my own pocket, and the remainder into the treasury of California. If, as we have endeavored to

tribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them.

show in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further. But we have thus far only considered the effect of the statute on the owner of the vessel. As regards the passengers, section 2,963 declares that consuls, ministers, agents, or other public functionaries of any foreign government, arriving in this state in their official capacity, are exempt from the provisions of this chapter. All other passengers are subject to the order of the commissioner of immigration. Individual foreigners, however distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent commissioner. Such a person may offer to furnish any amount of surety on his own bond, or deposit any sum of money, but the law of California takes no note of him. It is the master, owner, or consignee of the vessel alone whose bond can be accepted. And so a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend. While the occurrence of the hypothetical case just stated may be highly improbable, we venture the assertion that if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress. Or, if this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the state of California, for by our constitution she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the federal government? If that government has forbidden the states to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the constitution,

In the case of a company limited by shares, no contribution is to be required from any member exceeding the amount unpaid on the shares in respect of which

which provides for this, done so foolish a thing as to leave it in the power of the states to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the states the acts for which it is held responsible? The constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to congress and not to the states. It has the power to regulate commerce with foreign nations, the responsibility for the character of those regulations, and the manner of their execution belongs solely to the national government. If it be otherwise a single state can at her pleasure embroil us in disastrous quarrels with other nations. We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and can not be carried beyond the scope of that necessity. When a state statute, limited to provisions necessary and appropriate to that object alone, shall in a proper controversy come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary or even appropriate for this purpose as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is not to obtain indemnity, but money. The amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one-fifth of all he can obtain. The money when paid does not go to any fund for the benefit of immigrants, but is paid into the general treasury of the state and devoted to the use of all her indigent citizens. The blind, or the deaf, or the dumb passenger is subject to contribution, whether he be a rich man or a pauper. The patriot seeking our shores, after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with

he is liable as a present or past member. In the case of a company limited by guarantee, no contribution is to be required from any member exceeding the amount

his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco. It is idle to pursue the criticism. In any view which we can take of this statute it is in conflict with the constitution of the United States, and therefore void. The judgment of the supreme court of California is reversed, and the case remanded to that court with directions to make an order discharging the prisoner from custody. That the clause in question does not interfere with the rights of congress or the states to pass bankruptcy or insolvency acts or statutes of limitation which are not *ex post facto*, has been repeatedly decided. See *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Id. 213; *Boyle v. Zacharie*, 6 Pet. 348; *Planters' Bank v. Sharp*, 6 How. 38; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297; *Blanchard v. Russell*, 13 Mass. 1; *Kimberly v. Ely*, 6 Pick. 440; *Norton v. Cook*, 9 Conn. 314; *Smith v. Parsons*, 1 Ohio St. 107; *James v. Stull*, 9 Barb. 482; *Bruce v. Schuyler*, 4 Gilman, 221, 227; *Howard v. Kentucky & Louisville M. Ins. Co.*, 13 B. Mon. 285; *McMillan v. McNull*, 4 Wheat. 209; *Mather v. Bush*, 16 Johns. 233; *Storking v. Hunt*, 3 Den. 274; but see *Golden v. Prince*, 3 Wash. C. C. 313; as to statutes of limitation see *McCracken v. Hayward*, 2 How. 608; *Society, &c. v. Wheeler*, 2 Gallis. 41; *Jackson v. Lamphire*, 3 Pet. 290; *Blackford v. Peltie*, 1 Blackf. 36; *Proprietors of Ken. Purchase v. Laboree*, 2 Green, 293; *Call v. Hagger*, 8 Mass. 423; *Bronson v. Kinzie*, 1 How. 311. 'But,' said MARSHALL J., in *Sturges v. Crowninshield* (4 Wheat. 122, 207), 'if, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.' *Jackson v. Lamphire*, 3 Pet. 290; *Bronson v. Kinzie*, 1 How. 311. Among the rights reserved by the state in granting corporate franchises to railroad companies, is the power to regulate the approaches to, and the crossing of, public highways, and the passage through cities and villages, and generally to protect

of the undertaking entered into on his behalf by the memorandum of association. The Act is not to invalidate any provision contained in any policy of insurance or other contract, whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect thereof. No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise is to be deemed to be a debt of the company payable to such member, in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributors amongst themselves. By the 30 & 31 Vict. c. 131 s. 4, where a company is formed as a limited company under the 25 & 26 Vict. c. 89, the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum of association, be unlimited. By sect. 5, such director or man-

the life and property of its citizens; and the exercise of corporate franchises must yield to this right. Under such right the corporate authorities of a town had a right to pass an ordinance providing 'that it shall be unlawful for any railroad company, by themselves or their agents, to run at a greater rate of speed within the corporate limits of the town of Cuba than five miles per hour,' and to provide a penalty for its violation of not less than ten dollars nor more than one hundred dollars; and where a railroad company runs its trains through the limits of such town in direct violation of such ordinance, and injury is thereby done, such damage, by virtue of the statute, will be presumed to have been done through the negligence of the company, and injury, killing, and violation of the ordinance will make out a *prima facie* case of negligence, and throw the onus upon the company to rebut the presumption." *Toledo, &c. Railway Co. v. Deacon*, 7 Am. R. R. Rep.

ager, in addition to his liability to contribute as an ordinary member, is to be liable to contribute as if he were a member of an unlimited company. But no contribution required from any past director or manager who has ceased to hold such office for a period of one year, or required in respect of any debt or liability contracted after he ceased to hold such office, is to exceed the amount which he is liable to contribute as an ordinary member of the company; and, subject to the provisions contained in the regulations of the company, no contribution required from any director or manager is to exceed the amount which he is liable to contribute as an ordinary member, unless the court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up. If the directors of a registered company have borrowed money, which has been applied *bonâ fide* to the purposes of the company, and the members or shareholders have had the benefit of the transaction, the loan constitutes a debt due from the company, in respect of which contribution may be enforced, although no express power to borrow money had been granted to the directors. (*t*) All persons who have purchased shares and received dividends, (*x*) or who have applied for, and excepted and received, an allotment of shares, (*y*) or who have agreed to take shares and subscribe capital for the purpose of carrying on the undertaking, or are actually holders of shares in the company, are liable to be made contributors to the debts and liabilities of the company,

(*t*) *Elect. Tel. Co., in re*, 30 Beav. 225.

(*x*) *Barclay, ex parte*, 27 L. J., Ch. 664.

(*y*) *Best's case*, 34 L. J., Ch. 523. *Thomson's case*, *Ib.* 525. *Cockney's case*, 28 *Ib.* 12. *Worth, ex parte*, *Ib.* 589.

whether they have executed the deed or signed the contract, or hold their shares, as trustees, or in their own right, or as mortgagees or creditors. (z) But it does not necessarily follow that, because a man has claimed to be a member and has attended a meeting in that character, and has been registered and returned as a member by the directors, he can be made liable as a contributory to the debts of the company. (a) If he has agreed to accept shares, but has revoked his agreement or offer before it has been accepted, and before any shares have been allotted him, or if the shares have not been allotted within a reasonable time, (b) he can not be made a contributory, although shares have been subsequently allotted to him, and his name has been placed on the register of members and returned to the registrar. (c) So, if he has never been a shareholder at all, and there has never been any privity between him and the company, but he has simply purchased shares in the name of another person, who has been accepted as a shareholder by the company. (d) So, if he has accepted shares conditionally, and has been registered as a member, he is nevertheless not liable to be placed on the list of contributories, if the condition annexed to his acceptance of the shares has never been fulfilled, and he has never signed the deed of settlement or any subscription contract. (e) If however, the members generally are neither party nor privy to the con-

(z) Holt, *ex parte*, 20 L. J., Ch. 413.
 Gay, *ex parte*, 21 Ib. 284. Hall's case,
 3 De G. & S. 80. Price's case, Ib.
 146. Lumsden v. Buchanan, 4 Macq.
 H. L. Cas. 959.

(a) Electric Tel. Co. v. Bunn, 29 L.
 J., Ch. 913.

(b) Ramsgate Victoria Hotel Co. v.
 Montefiore, 4 H. & C. 164; 35 L. J.,

Ex. 90.

(c) Graham, *ex parte*, 30 L. J., Bk.
 42.

(d) King's case, L. R., 6 Ch. 196;
 40 L. J., Ch. 361.

(e) Wood's case, 3 De G. & J. 91
 Irish Peat Co. v. Phillips, 30 L. J., Q.
 B. 363. Leeds Banking Co., *in re*, 36
 L. J., Ch 42; L. R. 2 Ch. 181.

dition, if, for instance, it has been a mere private arrangement by the directors behind the backs of the members, the party can not be relieved from the common burden of the contribution. (*f*) The register of members, therefore, is not conclusive evidence as to who are and who are not contributories, as the court can put those on the list of contributories who are not registered as members, and can strike out from the list of contributories those who are so registered. (*g*)

1322. *Calls on contributories constituting specialty debts.*—The liability of any person to contribute to the assets of a company in the event of its being wound up is to be deemed a specialty debt due from such contributory to the company. (*h*) But calls founded on colonial Acts create only simple contract debts. (*i*)

1323. *Fraudulent representations by directors inducing parties to become shareholders* afford no valid ground, as regards creditors, for resisting the liabilities attaching to the ownership of shares. (*k*) Parties having taken shares, and held themselves out as partners and shareholders, can not, by repudiating their shares on the ground that they have been defrauded, make themselves no longer shareholders, and thus get rid of their liability to the creditors of a failing concern. (*l*) But, although they may not be able to exonerate themselves from their liability to credi-

(*f*) Nickoll's case, 24 Beav. 641.

(*g*) London, Hamburg, and Continental Exchange Bank, *in re*, L. R., 2 Eq. 226.

(*h*) Wentworth v. Chéville, 26 L. J., Ch. 760.

(*i*) Welland Rail Co. v. Blake, 30 L. J., Ex. 5; 6 H. & N. 410.

(*k*) Oakes v. Turquand, L. R., 2 H. L. 325; 36 L. J., Ch. 949.

(*l*) Henderson v. Royal Brit. Bank. 7 Ell. & Bl. 364. Daniel v. Roy. Brit. Bank, 1 H. & N. 681. Oakes v. Turquand, 36 L. J., Ch. 499; L. R. 2 H. L. 325. Western Bank of Scotland v. Addie, L. R., 1 Sc. App. 145.

tors who may have trusted the company on the faith of their being shareholders, yet, as between themselves and the other shareholders, they may, in certain cases, successfully resist a claim to enforce a contract for the purchase of shares, by showing that they had been drawn in to accept shares by the fraudulent representations or concealment of the directors (*m*) or the general body of shareholders. (*n*). If the directors of a company prepare a document containing a false exposition of the state of the affairs of the company for the information of their own shareholders, and one of the directors exhibits the document to strangers, for whose perusal it was not intended, the other directors and the company are not bound by this unauthorized act, and are not responsible for the consequences thereof. (*o*) And a misrepresentation of the effect of the deed of settlement by an officer of the company, will not release a shareholder, if it was no part of his functions to read, or explain, or expound the deed. (*p*) By the Companies Act, 1867, s. 38, every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, must specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise; and any prospectus or notice not specifying the same

(*m*) Roy. Brit. Bank, *in re*, 30 L. J., Ch. 322. Russian Ironworks Co., *in re*, L. R., 1 Ch. 574; 35 L. J., Ch. 738. Ship, *ex parte*, 2 De G. J. & S. 544.

(*n*) Ayre's case, 25 Beav. 513. Glasgow Nat. Ex. Co. v. Drew, 2 Macq. 103. Mixer's case, 28 L. J., Ch. 879; 4 De. G. & J. 575, 583.

Bell's case, 22 Beav. 40. Blake, *ex parte*, 34 L. J., Ch. 278; 34 Beav. 639.

(*o*) Nicol's case, Royal Brit. Bank, *in re*, 3 De G. & J. 440. Bigg, *ex parte*, 28 L. J., Ch. 50. Worth, *ex parte*, *Ib.* 589.

(*p*) Sheffield's case, 28 L. J. Ch 325.

is to be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.

Shareholders are never relieved from being contributories on the ground that they had taken their shares on the strength of false representations made by third parties, and not by the directors who allotted them the shares. (*q*) And, whenever they rely on fraud as shielding them from liability on the partnership contract, they ought to show that, as soon as they became aware of the deception practised upon them, they repudiated their shares, and disclaimed all further connection with the undertaking; for, if, notwithstanding the fraud, they were content to remain partners and participate in profits, or in the chances of future profits, or attempt to sell the shares, (*r*) they can not avail themselves of the fraud. (*s*) In a case of fraud amongst the directors, in making it appear that they were entitled to commence business when they were not entitled to do so, there may be a defense by shareholders sought to be made contributories; but, if business has been commenced, and every one of the shareholders has been made liable for a large amount to the creditors of the company, contribution to the common external liabilities can not be resisted on the ground that the directors made a mistake or a miscalculation, and began business with less capital than they ought to have begun with. (*t*)

1324. Every co-contractor under a subscription

(*q*) *Duranty's case*, 26 Beav. 271.

Wilkinson's case, L. R., 2 Ch. 536

(*r*) *Briggs, ex parte*, L. R., 1 Eq.

36 L. J., Ch. 489.

483; 35 L. J., Ch. 520.

(*t*) *Longworth's Executors, ex parte*

(*s*) *Deposit Life Ass. v. Ayscough*,

29 L. J., Ch. 55; 1 De G. J. & F

6 Ell. & Bl. 763; 26 L. J., Q. B. 29.

17.

contract has a right to say that it was on the faith of the capital being found in the manner prescribed by that deed that he concurred in the undertaking, and to insist that every person who has signed the deed has become liable as a shareholder to the full amount of the shares for which he has signed, and should be placed on the register of the shareholders; and any underhand agreement between the directors and any particular subscriber, to the effect that he shall not be called upon, and that his subscription shall be merely nominal, and shall be used only as a bait to draw others in to the scheme, is absolutely null and void. (u)

1325. *Limitation of the liability of contributories.*—If several persons unite together in a joint undertaking or partnership, and in doing so contract between themselves that no one except the managers shall be liable beyond a given amount, this, although of no effect as regards strangers, is a perfectly valid and binding provision, limiting the liability of the shareholders as between themselves; and it is not in the power of any majority of the shareholders to bind a minority of them to any alteration of this provision. No single member of the company can, as between himself and his co-partners, be deprived of the benefit of this provision without his express consent. (x) When the deed of settlement and the contracts of the company provide for the formation of a capital fund by subscriptions and shares to meet the debts and liabilities, and declare that the directors and shareholders shall not themselves be personally responsible in respect thereof, but that the fund alone shall be answerable, the shareholders can not be called on to pay

(u) Davidson's case, 4 K. & J. 698.

(x) Rignold, *ex parte*, 22 Beav. 150
25 L. J., Ch. 603.

more than the amount of their several subscriptions to the capital stock, (*y*) unless the party dealing with the company had no notice of the limitation of liability and contracted in ignorance thereof. (*z*) But the creditors are of course entitled to have the fund made available, and may enforce payment from the shareholders to the full amount of their subscriptions and shares. (*a*)

1326. *Release of the liability to contribute by a transfer of the shares.*—All transfers of shares made after a winding-up order has been obtained must be shown to be bonâ fide transfers, not clothed with a trust for the benefit of the transferror, enabling him to rely on the transfer in the event of the company turning out ill, and to claim back the shares if it turns out well, (*b*) nor mere colorable devices for shifting the liability attaching to the ownership of the shares from a responsible proprietor to a man of straw, (*c*) or an infant. (*d*) If the consent of the directors is required to the transfer, that consent must be expressly or impliedly obtained. (*e*) If the transferee has executed the ordinary form of transfer deed, and has contracted or agreed to hold the shares upon the terms of the original deed of settlement or subscription contract, or upon the terms on which the transferror himself held them, the contribution due from him will be a specialty

(*y*) Athenæum Ins. Soc., *in re*, 28 L. J., Ch. 335. Iethbridge v. Adams, L. R., 13 Eq. 547.

(*z*) Gordon v. Sea Fire, &c., Ins. Co., 1 H. & N. 599; 26 L. J., Ex. 202.

(*a*) Cope, *ex parte*, 20 L. J., Ch. 28. Talbot, *ex parte*, 16 Jur. 855.

(*b*) Chinnock's case, 1 Johns. 717. De Pass's case, 28 L. J., Ch. 769.

(*c*) Mexican & South Amer. Co., *in re*, 27 Beav. 465; 28 L. J., Ch. 628;

30 L. J., Ch. 113. Budd, *ex parte*, 31 L. J., Ch. 4. Hatton, *ex parte*, 31 L. J., Ch. 340. Electric Telegraph Co., *in re*, 30 Beav. 143; 31 L. J., Ch. 4. Gilbert's case, L. R., 5 Ch. 559; 39 L. J., Ch. 837.

(*d*) Weston's case, L. R., 5 Ch. 614; 39 L. J., Ch. 753.

(*e*) Roy. Brit. Bank, *in re*, 3 De G & J. 433.

debt, and the company will be entitled to rank as specialty creditors upon his estate in respect thereof. (*f*) Where one of the rules of a mining company enabled any of the shareholders to determine their liabilities on giving notice to the purser of their desire to retire, and, depositing with him a transfer of their shares, and signing a relinquishment of all claims on the company in respect of their shares, it was held that shareholders who had complied with these formalities could not be made contributories in respect of the debts and liabilities of the company. (*g*) But, in general, a shareholder who has transferred his shares, but whose transferee has not been registered in the share register book, will be liable to be made a contributory to the company, unless the proposed transferee has acted as the owner of the shares, (*h*) or unless the non-registration of the transferee is owing to the default of the company. (*i*)

All contracts and transactions between the directors and shareholders, which are to have the effect of allowing certain of the members to transfer their shares to the company and retire from the concern, without substituting the liability of any new members in their stead, apparently enabling shareholders who may have the command of money to escape from all further liability at the expense of their co-partners, are regarded with the greatest distrust, and will in general be invalid. If the transaction is not in truth a transfer within the intent and meaning of the statutory or authorized regulations, if, for instance, no substituted share-

(*f*) Hay v. Willoughby, 22 L. J., Ch. 253.

(*g*) Fenn, *ex parte*, 22 L. J., Ch. 672. Birch, *ex parte*, 28 Ib. 894.

(*h*) Wrysgan Slate, &c. Co., *in re*, 28 L. J., Ch. 875.

(*i*) Fyfe's case, L. R., 4 Ch. 768; 38 L. J., Ch. 725. Lowe's case, L. R., 9 Eq. 589; 38 L. J., Ch. 458.

holder is introduced into the company, but the pretended transfer is a mere scheme between the directors and certain shareholders to enable those shareholders to withdraw from the liabilities and responsibilities of a failing concern, on giving up their shares to the company, in a mode which is not sanctioned or provided for by the deed of settlement, the transaction will be invalid, and the retiring members will not be released from liability. (*k*) If, on the other hand, the transaction, though not in strict accordance with the mode of transfer prescribed by the deed of settlement, is, nevertheless, such a mode of transfer of shares and of retirement from the company as has been recognized, (*l*) and adopted and acted upon, by the general body of shareholders, and is not a contrivance to enable certain shareholders, having capital, to get rid of the responsibilities attaching to holders of shares in an insolvent partnership, but is a bonâ fide compromise of a controversy between the directors and a particular shareholder with the view of enabling such shareholder to withdraw from the company, (*m*) the transaction can not be treated as a void transaction; and a company is not entitled to treat a transfer as void merely because there has not been an observance of those forms and ceremonies which their own irregularity and neglect have made it impossible strictly to observe. (*n*) And, in the case of a bonâ fide transfer, when the liability of a new shareholder is intended to be substituted in the place of a retiring member, the

(*k*) *Morgan, ex parte*, 18 L. J., Ch. 268. *Ex parte Lawes*, 21 Ib. 690. *Ex parte Bennett*, 24 Ib. 130. *Ex parte Stanhope*, 19 Ib. 389. *Re New-castle, &c.*, 24 Law T. R. 86. *Spackman's case*, 34 L. J., Ch. 321.

(*l*) *Re Brit. Prov., &c.*, 33 L. J., Ch. 92.

(*m*) *Lord Belhaven's case*, 34 Ib 503; 3 De G. J. & S. 41.

(*n*) *Bagge, ex parte*, 20 L. J. (Ch. 229. *Jessop's case*, 2 De G. & J. 633.

transaction will be upheld, if it has been recognized and adopted by the company, although it is not strictly correct in point of form. If the provisions of the deed of settlement with respect to the admission of new members and shareholders have systematically been disregarded, and some new mode of making a man a shareholder has been adopted by common consent, or with general acquiescence on the part of the shareholders, such new mode of admission will be binding on the company and on the party who has agreed to accept shares and become a member. (o)

If a contract in writing for the sale or transfer and acceptance of certain specified shares has been entered into, the party who has agreed to accept the shares is liable to be placed on the list of contributories; and such a contract may operate as releasing the one party and rendering the other liable as a contributory, although no transfer deed has been actually executed and registered, and the forms necessary to complete the transfer have never been gone through. (p) If shares are transferred to a party without his knowledge and assent, the transfer is invalid, (q) and the transferee can not, of course, be made liable to the debts of the company; but, if the transferee, by his acts, adopts the transfer—if he assumes to be a proprietor, and thinks fit to avail himself of the benefits and advantages of proprietorship—he is to all intents and purposes a member of the company, and can not avail himself of the objection that the various formalities required by the deed of settlement, to make

(o) Walter's case, 3 De G. & S. 156. *Bargate v. Shortridge*, 5 H. L. C. 297.

(p) Sanderson's case, 3 De G. & S. 66, Cockburn, *ex parte*, 20 L. J., Ch. 198, Bernard, *ex parte*, 21 Ib. 468.

Yelland, *ex parte*, Ib. 852. White's case, 3 De G. & S. 157.

(q) Hennessy, *ex parte*, 2 Mac. & Gord. 207. Griseworth and Smith's cases, 4 De G. & J. 544.

a man a shareholder, had never been complied with. (r)

1327. *Release from liability to contribute by reason of a forfeiture of shares.*—If the directors have declared a forfeiture of the shares, and had power so to do, and the power has been properly exercised, the holder, of the forfeited shares, being no longer a shareholder, can not be made a contributory. (s) But, if the forfeiture is a nullity, as for instance, if it has been illegally made, or if there is no clause in the deed of settlement or articles of association authorizing the forfeiture, the shareholder will not be discharged from liability, and his name must be retained on the list of contributories. (t) To make a good legal forfeiture, the directions and requisites of the power of forfeiture must be strictly and bonâ fide observed. And, if the requisites of the power have been strictly observed, but the exercise of the power is the result of a collusive and unauthorized agreement, there is no valid forfeiture, and no release of the shareholder from liability to contribute. (u) But, if there is a valid resolution declaring a forfeiture, it is immaterial that the name of the owner has not been removed from the register. (x)

1328. *Extent and duration of the liability of outgoing and incoming shareholders.*—Generally speaking, when a man comes in as a purchaser of shares in a joint-stock company, he takes them with all their rights and liabilities, so that, if a liability to a loss has been incurred before he purchased, he may be called

(r) Maguire's case, 3 De G. & S. 35. Gower's case L. R., 6 Eq. 77.
 (s) Woolaston's case, 4 De G. & J. 445; 28 L. J., Ch. 721. (u) Agricult. Cattle Ins. Co., *in re*, 34 L. J., Ch. 329; 35 L. J., Ch. 296; L. R., 1 Ch. 161, 511.
 (t) Barton, *ex parte*, 28 L. J., Ch. 637. (x) Lyster's case, L. R., 4 Eq. 233; Jones, *ex parte*, 27 Ib. 668. 36 L. J., Ch. 616.

upon to contribute thereto as soon as he has accepted a transfer of shares and become a shareholder in the concern. (y) But, if the deed of settlement provides that a selling member shall be absolved from future liabilities, but shall remain liable for losses already incurred, and also provides for the publication of half-yearly balance-sheets, showing the half-yearly profits and losses, which balance-sheets are to be binding and conclusive on all the shareholders, unless some error be discovered in them within a certain limited period, and the partners deal with each other upon the footing of the accounts furnished, the losses to which an outgoing shareholder continues liable, notwithstanding a transfer, will, as between the members inter se, be those which appear on the face of such published balance-sheets. (z) No person can be settled on the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required to be made by them. (a) The discharge of a contributory who is a member at the time of the winding-up will not release him from his liability to indemnify the past member, his transferee, where the company is wound up within twelve months from the transfer. (b)

1329. *Liabilities of husbands, real and personal representatives, heirs-at-law, devisees, and assignees, as contributories.*—A husband who has received dividends on shares standing in his wife's name is liable

(y) *Cape's executors, ex parte*, 22 L. J., Ch. 601. *Mayhew, ex parte*, 24 L. J., Ch. 353.

(z) *Holme, ex parte*, 22 L. J., Ch. 228.

(a) *Needham's case*, L. R., 4 Eq. 135; 36 L. J., Ch. 665. *Andrew's*

case, L. R., 3 Ch. 161. See the 25 & 26 Vict. c. 89, s. 38 (3).

(b) *Roberts v. Crowe*, L. R. 7, C. P. 629; 41 L. J., C. P. 198. *Nevill's case*, L. R., 6 Ch. 43; 40 L. J., Ch. 1. *Hudson's case*, L. R., 12 Eq. 140 L. J., Ch. 444.

to be made a contributory, unless the shares were purchased by the wife without the participation of the husband, and the company has dealt with the wife exclusively as a married woman having a separate estate, and the question of right and liability is confined to the shareholders *inter se*. (c) The real and personal representatives of deceased shareholders and parties who have covenanted or agreed to subscribe a certain amount of capital to the joint stock of the company, or to take shares in a completely formed and established company, are liable to be made contributories to the extent of the assets in their hands, but no further, unless the personal representatives themselves have consented to become, and have been accepted as, shareholders in their own right. (d) All the real estate of deceased shareholders in the hands of the heir-at-law or of a devisee may be charged with the liabilities of the company incurred long after the death of the shareholder, although the shares may be in the hands of the personal representatives; for, if these last have no personal assets in their hands sufficient to satisfy a call made by the court, both the heir-at-law and the devisee must contribute in respect of the real assets received by them. The devisee, however, on being placed on the list of contributories in respect of the real estate of the testator in his hands, will have a right, as between himself and the other members of the company, to require that all the personal estate of the other members liable to contribute shall be first applied in liquidation of the debts of the company, so that the real estate in the hands of the

(c) *Burlinson's case*, 3 De G. & S. 19. *Sadler's case*, *Ib.* 42. *Angas, ex parte*, 1 *Ib.* 560. *Luard, ex parte*, 1 De G. F. & J. 533; 29 L. J., Ch. 269.

(d) *Blakeley, ex parte*, L. R., 3 Ch. 154. *Thomas's case*, 1 De G. & S. 579. *Robinson's case*, 20 L. J., Ch. 297.

devisee is not liable until all the available personal estate of the company and the shareholders has been exhausted. (*e*)

Where a shareholder, having bequeathed certain shares in a banking co-partnership to her son, and appointed her son and C her executors, died, and the two executors proved the will, and presented the probate at the office of the company, where it was entered in the books, together with the names of the executors, but the shares continued standing in the name of the deceased shareholder, and the dividends thereon were paid for many years to the son to whom they were bequeathed, and the executorship affairs were wound up except with reference to the shares in question, and the company became insolvent, it was held that the executors were liable as contributories in their character of personal representatives of the deceased shareholder. (*f*) There can not be a discharge of the testator's estate but by the substitution of another person liable. (*g*) The trustees of the estate of every bankrupt shareholder are also liable to be made contributories in respect of the estate of the bankrupt in their hands; but they are not subjected to any personal liability by the qualified insertion of their names in the list of contributories, unless they are guilty of some plain breach of duty. (*h*) The order of discharge of a bankrupt shareholder is, of course, a bar to all calls made on him for contribution before the date of his bankruptcy. (*i*)

(*e*) *Hamer's dev.*, *ex parte*, 21 L. J., Ch. 832; 2 De G. M. & G. 366. *Turquand v. Kirby*, 36 L. J., Ch. 570; L. R., 4 Eq. 123

(*f*) *Ex parte Crossfield*, 16 Jur. 731.

(*g*) *Ex parte Wood*, 22 L. J., Ch.

365; 17 Jur. 813. *Keene's executors*, 3 De G. M. & G. 280.

(*h*) *Kuper's assignees*, 3 De G & S. 113.

(*i*) *Chappel's case*, 5 Ib. 400. *Parbury, ex parte*, 30 L. J., Ch. 513.

1330. *Railway Companies—Contracts ultra vires.*—Railway companies, like registered joint-stock companies, are not entitled to engage in business not authorized by their act of parliament. Although, therefore, the act of parliament which constitutes and incorporates the company contains no prohibition against the company's engaging in any business except that of making and maintaining and using the railway, yet, if all the shareholders excepting one agree to carry on a different business, that single dissentient shareholder may go to the court for an injunction. (*k*) But acquiescence on the part of those who complain of the violation of the principle will induce the court to refuse relief; they must come with diligence to assert their rights. (*l*)

1331. *Powers of the Directors.*—As a general rule, the directors have no right to pledge the funds of the company for the purpose of supporting the operations of another company, or for carrying on a new trade, or for any transactions different from those they are expressly authorized to carry out. If the company has possessed itself of shares in another independent railway company, it can not legally, if there be a single dissentient shareholder, increase the number of its shares, or apply its funds for the support of the second company. (*m*) If it has been authorized to make a railway to the banks of a navigable river, and erect thereon wharves and warehouses for the reception and storage of merchandise, and empowered to raise funds for these purposes, it can not lawfully

(*k*) Att.-Gen. v. Gt. North. Rail. Co., 29 L. J., Ch. 798. Hare v. Lond. & North-West. Rail. Co., 30 L. J., Ch. 817. Forest v. Manchester, Sheffield & Lincolnshire Ry. Co., 30 Beav. 40.

(*l*) Graham v. Birk., &c., Ry. Co., 12 Beav. 466; 2 Mac. & G. 146. Ffooks v. Lond. & S. W., 17 Jur. 365.
(*m*) Salomons v. Laing, 12 Beav. 339

apply such funds when raised in deepening the river and improving the navigation thereof. (*n*) If, under separate acts of parliament, the company has power to construct branch railways in connection with its main line, and to raise capital for the purpose, it can not lawfully apply the money raised for the construction of the branch railways to the prosecution of works on the main line. (*o*) But a railway company authorized to construct a railway on the broad gauge may lay down rails on the narrow gauge; (*p*) and, when authorized to contract with other companies for the use of the railway, or for the passage thereon of the carriages and engines of other companies on payment of toll, may make any bonâ fide bargains for carrying into effect the objects authorized, however imprudent and unwise the contract may be. (*q*)

1332. *Applications to parliament for an extension of the powers of the company.* It is competent for the corporation at any time to apply to parliament to vary or extend the objects for which the company was originally incorporated, and to enter into contracts for works and services, and employ their funds in furtherance of such an object; (*r*) and it is not within the province of a court to decide on the propriety of the application, or to interfere to prevent it. But the court will, in certain cases, interfere to prevent a company from using its funds, and pledging its credit, and entering into contracts, for the purpose of such an application. (*s*) If the Act is obtained,

(*n*) *Munt v. Shrews. & Chest. Rail. Co.*, 13 Beav. 1.

(*o*) *Bagshaw v. East Un.*, 2 M'N. 389.

(*p*) *Beman v. Rufford*, 15 Jur. 914.

(*q*) *South York. Rail. Co. v. Gt. North.*, 9 Exch. 55; 22 L. J., Ex.

(*r*) *Bateman v. Mayor, &c., of Ash-ton-under-Lyne*, 3 H. & N. 323; 27 L. J., Ex. 458.

(*s*) *Great West. Rail. Co. v. Rush out*, 5 De Gex & Sm. 290. *Winch v Birk., &c.*, 16 Jur. 1035. *Ware v Grand Junc.*, 2 Russ. & M. 470.

provisions are generally inserted therein prescribing the mode in which the costs and expenses incurred in the procurement of the Act are to be defrayed. These are either made a charge upon the general funds and property of the company or upon the capital to be raised under the new Act. (*t*)

1333. *Void contracts by chairmen of railway companies.*—Where the chairman of the South Eastern Railway Company promised the managing committee of a proposed Deal and Dover Railway Company that if the committee went on with their project and applied to parliament for an Act of incorporation the South Eastern Railway Company would, in case of the rejection of the scheme, insure the committee against loss, &c., and an action was brought against the chairman for a breach of his undertaking, it was held that the contract was void, as it was a promise that the South Eastern Railway Company should do an act which was contrary to the public law of the country, of which law all the parties to the contract were bound to take notice. (*u*) The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried on upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. (*x*)

1334. *Money borrowed by directors on railway debentures.*—When directors borrow money on debentures, in pursuance of the statutory power conferred upon them, changing the tolls or rates they are

(*t*) Att.-Gen. v. Eastlake, 22 Law T. R., Ch. 20. Att.-Gen. v. Guard. Southampt., 17 Sim. 6. Att.-Gen. v. Andrews, 2 M'N. & G. 225. Stevens v. South Dev. Rail. Co. 13 Beav. 59.

(*u*) Macgregor v. Deal, Dover, &c., 22 L. J., Q. B. 69.

(*x*) Midland Ry. Co. v. London & North-Western Ry. Co., L. R., 2 Eq. 524; 35 L. J., Ch. 31.

authorized to levy with the repayment of the money advanced, and not entering into any personal covenant in their own names on behalf of the company, they incur no personal liability; (y) but if they exceed their borrowing powers, or do not pursue the authority given to them, they may render themselves personally responsible for falsely representing that they had power to borrow the money on the credit of the undertaking, and had charged the tolls, or rates, or funds of the company with the repayment of the money. (z) Where a railway company, by debenture, assigned to the plaintiff "the undertaking, and all tolls and sums of money" arising by virtue of their Act of incorporation, to hold until principal and interest were satisfied, the principal sum to be repaid by a time specified, it was held that the last-named stipulation amounted to a covenant on the part of the company for the payment of the money. (a) A mortgage or bond for securing money borrowed by a railway company, according to the form in schedule C, annexed to the Companies Clauses Consolidation Act, 1845, charges the "going concern" created by the Act, but not the surplus lands of the company or the proceeds of the sale of them. (b) But a company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works. (c)

1335. Bonds and loan notes by directors.—Direct-

(y) *Pontet v. Basingstoke Can. Co.*, 4 Se. 189. *Pardoe v. Price*, 11 M. & W. 427.

(z) *Collen v. Wright.*, 8 Ell. & Bl. 647; 26 L. J., Q. B. 147; 27 Ib. 217. *Polhill v. Walter*, 3 B. & Ad. 124.

(a) *Hart v. East Un. Rail. Co.*, 7 Exch. 246. *East Un. &c., v. Hart*, 3 Exch. 116.

(b) *Legg v. Mathieson*, 29 L. J., Ch. 384. *Furness v. Caterham Rail.*, 27 Beav. 358. *Gardner v. London, Chatham & Dover Ry. Co.*, L. R., 2 Ch. 201; 36 L. J., Ch. 323.

(c) *Gardner v. London, Chatham & Dover Ry. Co.*, L. R., 2 Ch. 201; 36 L. J., Ch. 323.

ors of railway companies can not borrow money except in the way authorized by the special Act. When they are empowered to borrow on mortgage, this is a special, limited mode of borrowing, and they can not borrow on bond or loan note so as to charge the company with the repayment of the money; but, where there is a debt due to contractors in respect of work done for the company, a bond acknowledging the debt, and binding the company to pay it, may be issued. (*d*)

1336. *Contracts in which a director is personally interested.*—No person interested in any contract with a railway company is capable of being a director; and no director is capable of being interested in any contract, if he is either directly or indirectly concerned in any such contract, the office of such director is vacant, and he must thenceforth cease from voting and acting as a director. The contract itself is not expressly avoided; (*e*) but it is bad on general principles of equity, and, of course, can not be specifically enforced. (*f*) Every director is precluded from dealing on behalf of the company with himself or a firm of which he is a partner. Having duties of a fiduciary character to discharge, he can not enter into engagements in which his own personal interest may possibly conflict with the interests of those whom he is bound to protect. (*g*) It is an implied and inherent term of the contract or relationship subsisting between directors and shareholders, that the directors shall not make any profit to themselves out of the transactions

(*d*) *Chambers v. Manch. & Milfd. Rail. Co.*, 33 L. J., Q. B. 268. 7 & 8 Vict. c. 85, s. 19.

(*e*) 8 & 9 Vict. c. 16, ss. 85, 86. *Foster v. Oxf., &c., Rail. Co.*, 13 C. B. 200.

(*f*) *Flanagan v. Gt. Western Ry. Co.*, L. R., 7 Eq. 116; 38 L. J., Ch. 117.

(*g*) *Aberdeen Rail. Co. v. Blaikie* 1 Macq. 461.

they enter into on behalf of the company, and shall not acquire any interest adverse to their duty. (*h*)¹

1337. Indemnification of directors.—No director is liable to be sued by reason of his being a party to any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors. The directors, their heirs, executors, &c., are to be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them; and the directors for the time being may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary, for that purpose, make calls of the capital remaining unpaid. (*i*) The directors are protected from liability so long only as they act within the scope of their power and authority as directors, and bind the company by their contracts.² If they do not strictly pursue the powers given them, and fail to bind the company, they are in general individually responsible for the fulfillment of the engagements they have entered into. They are responsible

(*h*) *Benson v. Heathorn*, 1 Y. & C. Hudson, 22 L. J., Ch. 529. *Gaskell Ch. C.* 341. *York. & North Mid. v. v. Chambers*, 26 Beav. 360.

(*i*) 8 & 9 Vict. c. 16, s. 100.

¹ A director of a railroad company holding an office fiduciary in its character can not become a purchaser of the corporation property during the term of his directorship, except subject to the company's right to disaffirm and demand a re-sale, though if he were an execution creditor he might sell under his execution. *Hoyle v. Plattsburgh, &c., R. R. Co.*, 7 Am. Railw. Rep. 283; 54 N. Y. 314.

² The action of the board of directors of a corporation, when in session, is not required merely to direct the labor of an employee of the corporation. *Bee v. San Francisco, &c., R. R. Co.*, Id. 504; 46 Cal. 248.

also for gross negligence and misconduct in the administration of the corporate funds, and the management of the business intrusted to them, and can not shelter themselves from the ordinary consequences resulting from breaches of trust and neglect of duty under the protecting clause of the act of parliament. They can not be said to be lawfully executing the Act when they are misbehaving themselves.

1338. *Contracts between projectors and members of committees of management of projected undertakings.*—We have already seen¹ that, whenever a number of persons are jointly associated together and contributed labor or services, or money or goods, or house-room or apartments, in furtherance of a common design, the law raises no implied contract or promise between them, or from any one or more of them, in favor of another, for payment or remuneration for the services so rendered, or goods supplied, or for repayment of the money advanced. The services, therefore, rendered, and the things done, by any one member of a managing committee of a particular undertaking, in the discharge of the functions of such committee, can not be made the subject of a claim for payment or remuneration on his part as against the committee at large. The things done by him individually have been done for his own benefit and advantage, as well as for the benefit of the rest of the promoters and managers. All are presumed to contribute in some shape or another to the advancement of the joint undertaking; and the supposed superior services of one can not be made the foundation of a claim for a remuneration from another. Thus where a surveyor took an active part in the promotion of a railway company, gave

¹ *Ante.*

notices of an intended application to parliament, and subscribed for some of the shares, it was held that he could not maintain an action against the co-projectors for work done by him and money paid in furtherance of the joint undertaking. (*k*) So, where the inventor and patentee of a new scheme for making roads got a number of gentlemen to act as a provisional committee for the formation of a joint-stock company, to carry his scheme into effect and work the patent, and acted as secretary to the committee, it was held that he could not maintain an action against such committee, or any of the members thereof, for his services as such secretary, or for his trouble, or for journeys undertaken by him in furtherance and execution of the scheme, as he was himself one of the movers and instigators of the project, and the members of the committee had just as much right to charge him for their attendance and attention to his scheme, as he them for his services as secretary. (*l*)

1339. *Contracts for the payment of the projector out of the deposits.*—Where a solicitor started a joint-stock company, and got several persons to form themselves into a committee of management, under an agreement that he would not hold any of them personally liable to him for the expenses incurred in the promotion of the project, but would pay all the expenses of promoting the company up to the time of the payment of the deposits, and would look to the deposits alone as the means of repayment, “the said deposits being held liable for that purpose by the directors of the company,” and deposits to a large amount were received, and a parliamentary contract and a subscribers’ agreement signed by the parties paying such

(*k*) *Holmes v. Higgins*, 1 B. & C.

(*l*) *Parkin v. Fry*, 2 C. & P. 311.

deposits, authorizing the directors to apply them in liquidation and discharge of the expenses incurred in the furtherance of the undertaking, it was held that the projector might proceed by bill in chancery against the directors and the provisional committee for the application of the money raised by the deposits in payment of his costs and disbursements on behalf of the company, and for an injunction against their parting with the fund. (*m*)

1349. *Contribution between joint managers, directors, and provisional committeemen.*—Where an action was brought against four persons who had acted as managers and directors of a projected railway company, for the recovery of a debt contracted by them in the carrying out of the project, and they jointly retained an attorney to defend the action upon their own responsibility, and one of the managers was subsequently compelled by the attorney to pay more than his proportion of the joint expense of defending the action, it was held that he was entitled to an action against his colleagues to recover from them their several proportions of the over-payment by way of contribution to the common liability. (*n*) If all the members of a provisional committee have not joined in authorizing the same contract, the contribution is confined to those who incurred the joint liability which has been discharged, and in respect of which the action is brought; and to determine the share that each is to pay, regard must be had to the number of the original co-contractors, so that, if twelve originally authorized the contract, and two are dead at the time the right of action for contribution arises, the survivors can only be called upon for one-twelfth

(*m*) *Parsons v. Spooner*, 15 L. J., Ch. 155. (*n*) *Edger v. Knapp*, 6 Sc. N. R. 707.

part each, the personal representatives of the deceased co-contractors being responsible for the residue of the contributory demand. (o)

1341. *Of the rendering of accounts and of the appropriation of the funds.*—The managing committee of a projected undertaking are trustees for the shareholders, and liable to account to them for all moneys which have been received for the purposes of the undertaking. (p) One member of the committee is entitled, as against the rest, to an account of the joint property, and of the joint debts and liabilities, and to have the joint property applied in discharge of such debts. (q)

1342. *Contracts between a committee of management on the one hand, and subscribers and shareholders on the other.*—The execution by a subscriber of a deed providing that a railway company is to be formed upon certain terms and conditions, and that a certain amount of capital is to be raised, a certain number of shares issued, an act of parliament obtained, and other preliminary proceedings undertaken prior to the incorporation of the company, does not, as we have already seen, make the subscriber so executing the deed a partner with the projectors and managers in carrying out the undertaking. Neither does an agreement to take shares, or the acceptance of an allotment of shares, and payment of a deposit thereon, make the party who has entered into the agreement, or paid the deposit, a partner with the projectors and managers, until the prescribed capital has been raised, the shares taken, and the conditions precedent to the formation and incorporation

(o) *Batard v. Hawes*, 2 Ell. & Bl. 654.

298.

(q) *Lewis v. Billing*, 15 L. J., Ch

(p) *Williams v. Page*, 24 Beav. 425.

of the company have been accomplished. They stand merely in the position of persons who have offered to become partners in a projected co-partnership, provided it is constituted and brought into operation *bonâ fide* in the mode advertised and announced, and not in the position of partners in a present partnership. (r) The promoters, and projectors, and members of the committee of management are consequently responsible to the subscribers and shareholders for money advanced, or goods supplied, or work done, or services rendered in furtherance of the project by any one or more of such subscribers by the orders, or at the request, of the members of such committee of management. (s)

1343. *Allotment of shares.*—The promoters and managers of a railway company are responsible also to a subscriber or applicant for shares, who has received from them letters of allotment of shares or of an interest in the undertaking, and has paid his subscription or deposit, for the non-delivery of scrip certificates of shares pursuant to the letters of allotment and the contract in that behalf made. And it has been held that an allotment of scrip and shares in an abortive scheme, which does not correspond with the prospectus and the public advertisements of the projectors, is not a compliance with the ordinary undertaking to deliver shares. (t) A resolution by shareholders, that a certain number of shares shall be at the disposal of the managers, places them at their disposal only as trustees, to be disposed of within the scope of the functions delegated to them in the manner most

(r) *Bourne v. Freeth*, 9 B. & C. 640; 4 M. & R. 518. *Wood v. Duke of Argyll*, 7 Sc. N. R. 885; 6 M. & Gr. 928.

(s) *Colley v. Smith*, 2 M. & Rob.

96. *Caldicott v. Griffiths*, 8 Exch. 902.

(t) *Walstab v. Spottiswoode*, 4 Rail. C. 321; 15 L. J., Q. B. 198.

beneficial to their beneficiaries. (u) The managers, in the due fulfillment of their trust, are bound to account to each shareholder or subscriber for the moneys received by them, and to apply the funds in their hands in liquidation of the debts and engagements of the company. (x)

1344. *Payment of subscriptions and deposits.*—The managers of a projected railway company may sue the subscribers for the sums they have agreed to subscribe, or for the deposits which they have agreed to pay, on receiving an allotment of shares, provided the covenant or contract to pay the subscription or deposit has not been obtained through the medium of any willful and fraudulent misrepresentation or misstatement. (y) Where an allottee had applied for shares generally in a projected railway company, and undertook to accept them and pay the deposit, and the directors assigned him shares headed “not transferable,” and then sued him for the deposit, it was held that he was not responsible, as his offer must be taken to have been an offer to accept and pay for transferable shares. (z)

1345. *Recovery of deposits on the abandonment of the undertaking.*—If the scheme has been abandoned, or has not been carried out according to the terms of the prospectus or public announcement of the projectors and managers, the subscribers who have advanced money or paid deposits on the shares allotted to them are entitled to recover back the amount paid, free from deductions and drawbacks in respect of the

(u) *Pulsford v. Richards*, 22 L. J., J., Ch. 140.

Ch. 564. *York & North Midland v. Hudson*, *Ib.* 529.

(x) *Cooper v. Webb*, 15 Sim. 454.

Cridland v. Lord de Mauley, 17 L. J., Ch. 190. *Maitland, ex parte*, 23 L.

(y) *Duke v. Forbes*, 1 Exch. 356
Aldham v. Brown, 29 L. J., Q. B. 32

7 Ell. & Bl. 164.

(z) *Duke v. Andrews*, 17 L. J., Ex. 231.

expenses that have been incurred by the managers in their attempt to bring the project to bear, (a) unless the failure or abandonment of the undertaking has been occasioned by the act or default of the plaintiff himself, or it has been expressly agreed that the money raised by subscription and deposits should be applied in liquidation and discharge of those expenses. (b) If the managers have by parol agreed to return the deposits in case an act of incorporation is not obtained, and a parliamentary contract and subscribers' agreement under seal is afterwards executed, authorizing the directors to expend the deposits in defraying the necessary expenses, the first agreement is not extinguished by the subsequent contract, if the two contracts have not been entered into by the same parties. (c) When deposits have been put into the hands of a committee with authority to deal with them in a certain way, it is not competent to any one, or more, not being the whole, of the persons who have joined in giving the authority, to revoke it. (d)

1346. *Misrepresentation by committeemen and managers.*—Any material mis-statement or misrepresentation concerning the actual condition of the projected undertaking, the amount of capital subscribed, and the number of subscribers, or co-adjutors, or co-adventurers in the project, is a fraud upon those who have subscribed their money and connected themselves with the company in reliance upon the pub-

(a) *Nockells v. Crosby*, 5 D. & R. 760; 3 B. & C. 823. *Chaplin v. Clarke*, 4 Exch. 403. *Walstab v. Spottiswoode*, 15 M. & W. 501. *Johnson v. Goslett*, 3 C. B., N. S., 594; 27 L. J., C. P. 122.

(b) *Jones v. Harrison*, 17 L. J., Ex. 132. *Garwood v. Ede*, Ib. 29.

Clements v. Todd, Ib. 31. *Watts v. Salter*, 10 C. B. 477; 20 L. J., C. P. 43. *Baird v. Ross*, 25 Law T. R. 34. *Ashpitel v. Sercomb*, 5 Exch. 146.

(c) *Mowatt v. Ld. Londesborough* 4 Ell. & Bl. 9.

(d) *Baird v. Ross*, 2 Macq. 61.

lished statements, and entitles them to avoid the contract they have entered into with the projectors and managers, and recover back from them the amount of their deposits and subscriptions, unless they were cognizant of the fraud at the time they took their shares, and voluntarily made themselves parties to a bubble speculation. (e) It is therefore necessary, in preparing prospectuses of joint-stock undertakings, to state nothing on the face of the prospectus but what is strictly true. (f) In an action for the recovery of the deposit paid on an allotment of shares, on the ground that the money was obtained by fraudulent misrepresentation or by false pretenses, it must be shown that the money was actually received by the parties against whom the action is brought, or that it was at their disposal, and that they were parties to the fraud. They are not liable for a fraudulent misrepresentation made by the secretary or solicitor of the company without their knowledge or sanction. (g)

1347. *Dissolution of inchoate railway and parliamentary works' companies—Contributories.*—Persons who act together for the purpose of obtaining an act of parliament for the purpose of incorporating a railway company, and making a railway, are a company or association within the meaning of the 28 & 29 Vict. c. 89, and may be dissolved and wound up by the Court. "All the questions as to the liability of contributories to inchoate railway and parliamentary works' companies, under the winding-up Acts, resolve

(e) *Wontner v. Shairp*, 4 C. B. 404 ;
4 Rail. C. 542. *Cridland v. Lord de
Mauley*, 17 L. J., Ch. 190. *Nicol's
case*, 3 De G. & J. 440. *Hill v. Lane*,
L. R., 11 Eq. 215 ; 40 L. J., Ch. 41.
Ship v. Crosshill, L. R., 10 Eq. 73 ;
39 L. J., Ch. 550.

(f) *New Bruns. & Canada Rail.
Co. v. Muggeridge*, 30 L. J., Ch.
242 ; 3 Law T. R., N. S., 651.

(g) *Watson v. Earl Charlemont*, 12
Q. B. 856 ; 18 L. J., Q. B. 65. *Burnside
v. Dayrell*, 3 Exch. 224.

themselves into two simple questions of fact: first, did the alleged contributory make, or authorize to be made, the contract in respect of which he is called upon to contribute on his account jointly with others? or, secondly, if any one or more entered into the contract on his own or their own behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequences of that contract?' Those who are liable to pay the debts incurred in the attempt to form the company, who have given the orders, or have concurred in giving them, are the parties to be made contributories; and no one can lawfully be put on the list of contributories merely by reason of his having agreed to take, or having accepted and become an allottee of, shares, and paid a deposit. (*h*) A provisional committeeman, who has accepted shares, and paid a deposit, but has done no further act, is not thereby rendered liable to creditors in respect of business done by order of the managers towards completing the projected undertaking, and can not lawfully be made a contributory to the debts due to such creditors. (*i*) But, if a provisional committee undertakes the management of the projected company, and gives orders, if, for instance, it appoints a managing committee, and such managing committee acts under the authority of the provisional committee, as their servants and agents, all members of the provisional committee who have concurred in the proceedings, and authorized debts to be incurred by the managing com-

(*h*) Capper, *ex parte*, 20 L. J., Ch. 151. Carrick, *ex parte*, Ib. 671. Maudslay, *ex parte*, Ib. 9. Barber, *ex parte*, Ib. 146. Beardshaw, *ex parte*, 22 Ib. 18.

(*i*) Cottle, *ex parte*, 2 Mac. & Gord

190. Bright v. Hutton, 3 H. L. C. 341; 16 Jur. 695. Carmichael, *ex parte*, 20 L. J., Ch. 12. Clarke, *ex parte*, Ib. 14. Heref. & Merth. Tid. Rail. Co., 4 Law T. R., N. S., 134.

mittee, will be liable to be made contributories to the payment of those debts. (*k*)

The question in every case is not merely what meetings has a committeeman attended, but what acts has he authorized to be done. Attendance at a meeting proves in general that the party so attending is a member of the body assembled; but it proves no more. If any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some circumstances; it may be a very unreasonable inference in others; and no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly assent. (*l*) But all persons who have taken part in the management of the company, who have attended meetings of the managers, and concurred in giving orders for things to be done and for expenses to be incurred, are liable to be made contributories to the debts incurred in carrying such orders into effect; (*m*) and so are all persons who have authorized the managing committee to act for them, and are under an obligation to indemnify such managing committee in respect of expenses bonâ fide incurred by them.¹ All persons, also, who are associated together in the furtherance of a common object, who concur in giving orders, or impliedly authorize one another to take all the necessary steps to carry the common purpose into effect, are bound by a well-

(*k*) *Tanner, ex parte*, 21 L. J., Ch. 214. *Spottiswoode's case*, 6 De G. M. & G. 371. (*m*) *Pearson's executors*, 3 De G. M. & G. 252. *Norbury's case*, 5 De G. M. & S. 423. *Londesborough, ex parte*,

(*l*) *Roberts, ex parte*, 2 Mac. & Gord 194. 23 L. J., Ch. 743.

¹ *Ante*,

established principle of equity to bear the burden equally, so that, if one alone incurs a necessary expense in the furtherance of the joint undertaking, the others must contribute their fair share of it. (*n*) All persons, also, who have signed a subscribers' agreement or parliamentary contract, and have covenanted or agreed to pay a certain portion of the preliminary expenses of the project and of the application to parliament for an Act of incorporation, may be properly placed on the list of contributories, although they have never received either scrip or shares. (*o*)

SECTION III.

OF MARRIAGE.

1348. *Contracts in restraint of marriage* are void, as being contrary to the public policy of the law. (*p*) A covenant or promise, therefore, which restrains a party from marrying at all, unless he marries a particular person, is null and void. (*q*) If the restraint is not to operate for an indefinite period, but only for six years, there must be reasonable grounds to restrain the party for that period. (*r*) But the law recognizes in a husband a species of interest in the widowhood of his wife, which makes it lawful for him to grant an annuity to his widow, to continue so long only as she remains unmarried. (*s*)

(*n*) *Amsinck, ex parte*, 25 Law T. 2234.
R., Ch. 136.

(*o*) *Bowen, ex parte*, 22 L. J., Ch. 857. *Warwick & Worc. Rail. Co., in re*, 27 L. J., Ch. 735.

(*p*) *Baker v. White*, 2 Vern. 215.
Hartley v. Rice, 10 East, 24. *Bonfield v. Hassell*, 32 L. J., Ch. 475.

(*q*) *Lowe v. Peers*, 4 Burr. 2230 to

(*r*) *Hartley v. Rice*, 10 East, 23, 24. But a covenant to pay a woman a sum of money, so long as she continues sole and unmarried, is not illegal. *Gibson v. Dickie*, 3 M. & S. 463.

(*s*) *Lloyd v. Lloyd*, 21 L. J., Ch. 596. *Newton v. Marsden*, 2 Johns & H. 356; 31 L. J., Ch. 690.

1349. *Marriage brokerage contracts*, or contracts for the payment of money, or the conveyance of property, or the performance of some act or duty, on the condition of the procurement of a particular marriage, are void, as being contrary to public policy. If, therefore, a man binds himself to pay a sum of money to another, on condition that he will bring about a particular marriage, the instrument is void (*t*) whether the condition, or cause or consideration, for the bond or covenant does or does not appear upon the face of it. (*u*) A bond, given by the husband to the wife's father to induce the latter to give his consent to the marriage, has been held to be in the nature of a marriage brokerage contract, and contrary to public policy. (*x*) And there is no difference between a bond to pay money and a bond to forgive a debt due, or a covenant or agreement to release an obligation, duty, or liability, as an inducement for the consent of parents and guardians. Therefore, where a mother said, "You shall not have my daughter, unless you will agree to release all accounts respecting my expenditure of her money," and the agreement was given, it was held to be within the mischief of a marriage brokerage contract. (*y*)¹

(*t*) *Hall v. Potter*, 3 Lev. 411; *Cole v. Gibson*, 1 Ves. senr., 503. Show. P. C. 76; 4 Br. P. C. 145, n; *Booth v. Earl of Warrington*, 4 Br P. C. 163.

(*u*) *Collins v. Blantern*, 2 Wils. 347. (*x*) *Keat v. Allen*, 2 Vern. 558. *Arundel v. Trevillian*, 1 Ch. Pre. Ch. 267.

Rep. 47. *Drury v. Hooke*, 1 Vern. 411. (*y*) *Hamilton v. Mohum*, 1 P Wms. 120; 2 Vern. 652; 1 Salk. 276. *Smith v. Aykwell*, 3 Atk. 566. 158.

¹ Marriage brokerage bonds which are not fraudulent on either party are yet void, because they are a fraud on third persons, and a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against as

A lease granted in consideration of the procurement of a particular marriage will be set aside, and the estate discharged of the lease. (2)

(2) *Stribblehill v. Brett*, 2 Vern. 446 ; 4 Br. P. C. 145.

a general mischief for the sake of the public. See PARSONS, C. J., in *Boynton v. Hubbard*, 7 Mass. 118. In *Susan Crawford v. Christina Russell*, plaintiff sued to recover of defendant the sum of two thousand dollars and interest, the value of a pianoforte and a gold watch and the expense of the education of plaintiff's eldest daughter, Kate, upon an agreement entered into by the plaintiff and defendant in the year 1846, under their hands and seals, which substantially read as follows: "That plaintiff should do all she could to aid a marriage between said Jeremiah and said Christina, by her influence and services," and in consideration thereof the said defendant faithfully promised and agreed with the plaintiff, in case she became the wife of the said Jeremiah Russell, and outlived him, to pay said plaintiff for her services in this matter two thousand dollars in cash, and to purchase for the plaintiff a pianoforte and a gold watch for her (plaintiff's) eldest daughter, Kate, and to pay the expense of her education to the plaintiff. Mr. Jeremiah Russell was a widower of great wealth, living at that time at Saugerties, in Ulster county, New York. The plaintiff alleged in her complaint that at the request of the defendant she did "so aid the defendant, furnished rooms, fire, and light for said Jeremiah and the said Christina to meet from time to time, and did various services for said defendant, and gave her care, skill, diligence, and attention in aid of said marriage, at great loss and expense, and performed her part of said contract, so that afterwards, and on or about the 30th day of October, 1847, the said Jeremiah Russell and the said Christina Crawford were lawfully married, and from that time lived together in great happiness and prosperity until 1867, when said Jeremiah Russell died, leaving his widow, the defendant, a large estate amounting to about fifty thousand dollars." PLATT PORTER, J.: "We are referred to no case arising in our own court where the questions now before us have had adjudication. The questions are elemental, and seem to admit of but little conflict. Two legal questions of this character are presented, upon each of which the agreement set forth is claimed to be void. First, that the agreement is post obit in its character, and therefore

1350. *Bonds and unilateral covenants to marry.*—

If a man of full age binds himself by deed to marry a woman by a day named, he is responsible for the non-

void, as being against public policy; and second, that the agreement comes within the definition of brokage of marriage, and is void for the same reason. . . . But the learned judge placed his decision to nonsuit upon the other feature of the case, that the agreement in question was a marriage brokage contract, and therefore void. This being a novel case in our courts it becomes our duty to examine it in regard to that question. We have said that the case depends upon elementary law. In this respect the civil law and the common law of England are found to differ. The writers upon jurisprudence in this country have generally followed the modern common-law of England. The civil law, as drawn from the code of Justinian, allowed contracts of this kind to be made by proxy, by marriage-brokers, match-makers, called *prox enctae*, who were allowed to receive rewards for their services, like other brokers, to a certain limited extent. Code Just., lib. 5. tit. 1, p. 16; and at an early period of the history of English jurisprudence these *prox enctae* plied their vocation in that country, and were tolerated. Story's Equity Juris., § 260. The policy of the civil law seems to have been that all aid rendered in encouraging, and in the establishment of, marriages was for the good of the nation, and promotive of public morality, inasmuch as it discouraged fornication, adultery, and concubinage; that, therefore agencies by way of match-makers, brokage, and *prox enctae*, were productive of good rather than of evil results. The policy of English law was that the effect of such agencies and brokage was the encouragement of influences of a pernicious tendency by being the occasion of many unhappy marriages, the loss of moral influence of parents over the happiness, due nurture, and education of children, the temptation to the exercise of an undue influence by false and seductive hopes held out to parties induced by the self-interest of brokage agents; these were regarded as so corruptive in their tendency as to receive condemnation in the law tribunals as being totally void. The first controversy that seems to have arisen in the English courts upon the validity of this character of agreements is the famous case of *Holland Keene v. Porter*, in the sixth year of the reign of William III., reported in 3 Levins, 412: One Nunne entered into a bond to pay Mrs. Potter £500 in three months after he should be

performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him. (2) If the covenantee is ready and willing

(a) *Atkins v. Farr*, 1 Ark. 237.

married to Lady Ogle, a widow of great fortune and honor. A suit was brought on the bond in chancery, and the master of the rolls held the bond to be void. The Lord Chancellor reversed the decree. The case was then taken by appeal to the House of Lords, where, by a majority of that House, the decree of the chancellor was reversed, they holding that agreements of this kind were of a dangerous tendency. Since that case the English courts have with great uniformity held the rule as declared in the House of Lords. After this, such contracts grew more and more into disrepute, and Bacon laid down this doctrine: "It is of such consequence that all marriages should proceed from free choice, and not from any compulsion or sinister means, that it hath been held that such interference was a matter indictable." *Bac. Abr. tit. Marriage and Divorce*. And in the eighth year of William III., a criminal information was filed against one Thorpe and others, for persuading the Edward Mitchell to marry one Cornelia Huntington. 5 Mod. R. 301. Judge STORY says, in his work on Contracts (§ 564), that the law considers marriage as a moral and political duty, and all proper restrictions upon freedom of choice, and all agreements tending to impair that mutual love and confidence upon which domestic happiness has its only sure foundation, and which are the only securities for faithfulness and morality in marriage, are stains which it will not permit to rest upon its empire. But it seems that the ground upon which the courts will interfere in cases of this kind is not upon the ground or idea of damages done to the individual concerned, but upon considerations of public policy; and "hence," says the same learned judge, "every temptation to the exercise of an undue influence or a seductive interest in procuring a marriage should be suppressed, since there is infinite danger that it may, under the disguise of friendship, confidence, flattery, or falsehood, accomplish the ruin of the hopes and fortunes of most deserving persons, especially females." *Eq. Jur.* § 161. In the case of *Jury v. Howe* (1 Vern. 210), Lord Chancellor KING said "that this character of agreement was a sort of a duty being into confinement, servitude and was in no case to be countenanced." See also, *Fiddling v.*

to receive the covenantor as a husband, and the latter neglects to fulfill his contract, he is liable to an action, for it is the duty of the man to go and offer himself to the woman, and not for the woman to go in search of the man. (*b*) A woman is also as much bound by such a deed or covenant as a man, provided it has been obtained openly and fairly, and with perfect good faith. But, as women are in general peculiarly liable to be deceived and imposed upon in affairs in which their feelings are concerned, such a contract or engagement obtained from a woman is regarded with the greatest jealousy and suspicion, particularly where the man has entered into no corresponding engagement on his part. (*c*) If such a bond is obtained by means of any misrepresentation or concealment of the circumstances and situation in life of the party to whom it is given it is undoubtedly fraudulent, and may be set aside (*d*) Where a bond was given by the defendant, a single lady, which recited that a marriage had been agreed upon between her and the plaintiff, but had been deferred at her request until after the death of

HARRIS v. DICKENSON, 1 FREEM.
346. SEYMOUR v. GARLIDE, 2 D. & R.
57.

(*c*) COCK v. RICHARDS, 10 VES. 437.

(*d*) KEY v. BELL, 12 2 VERN. 222.

Eq. ch. 6, 1 § 10; WILLARD, Eq. JURISPR. 210. The public policy of thus protecting ignorant or credulous persons from being the victims of secret contracts of this sort is, therefore, clear; and, as JUDGE STORY says, "the surprise is not that the doctrine should have been established in a refined, enlightened, and Christian country, but that its propriety should ever have been made a matter of debate." They are likened to lobby services in the legislature. HARRIS v. ROOF'S EXECUTORS, 10 BARB. 219. If, then, we are right that the doctrine is well-established that such agreements are void as against public policy, all advances of money and services performed must fall within the agreement itself. The result is that the learned judge was right in nonsuiting the plaintiff, and that judgment be given for the defendant, with costs.

her father, and as a provision for the plaintiff, she bound herself to give him £1,200, and interest at £5 per cent., in case she should refuse to marry him on her father's death, or should intermarry with anybody else, and the lady broke her engagement by marrying a third party, it was held that she and her husband were responsible for the payment of the money. (*e*) But if a bond of this description has been clandestinely obtained from a single lady having expectations from her parent, without the knowledge of such parent, it is a fraud upon the latter; and the court, if appealed to, will set it aside. (*f*)

1351. *Contracts of betrothment* are contracts between a man and a woman to marry at a future time. If a man makes an offer of marriage to a woman, the acceptance thereof by the latter may, so far as it is necessary to be proved in order to enable her to sustain an action against the man for a breach of his engagement, be established through the medium of her conduct and actions at the time, as well as by express words. (*g*) If there be an express promise by the man, and it appears that the woman countenanced it, and by her actions at that time behaved herself as if she agreed to the matter, that is sufficient evidence of a promise on her side. (*h*) Therefore, where a gentleman asked for and obtained the consent of the parents to his marriage with their daughter, and the young lady stood in the room within the hearing of the parties, and made no objection to the match, it was held that her silence afforded as cogent evidence of her assent as an express affirmative. (*i*)

(*e*) *Box v. Day*, 1 Wils. 59.

C. P. 293.

(*f*) *Woodhouse v. Shepley*, 2 Atk. 539. *Drury v. Hooke*, 1 Vern. 411. *Hartley v. Rice*, 10 East, 22.

(*h*) *Hutton v. Mansell*, 6 Mod. 172. (*i*) *Daniel v. Bowles*, 2 C. & P. 553. Il n'est pas toujours nécessaire que ce consentement soit exprès

(*g*) *Harvey v. Johnston*, 17 L. J.,

1352. *Authentication of the contract.*—Oral engagements and promises to marry will sustain an action, unless the marriage is limited to take place upwards of a year from the making of the contract.¹ A man who was paying attentions to a girl was asked what his intentions were, and he replied, "I have pledged my honor to marry the girl in a month after Christmas;" and it was held that this declaration, taken in connection with his visits to the house and conduct towards the girl, was sufficient evidence of a promise of marriage. (*k*) But a mere vague intimation by a party of his future intentions is no evidence of a promise of marriage. (*l*)

1353. *Time of performance.*—If the marriage is appointed to take place at a remote and unreasonably distant time, the contract would be voidable at the option of either of the parties, as being in restraint of matrimony.² If no time is fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period after request; and either of the parties may call upon the other to fulfill the engagement, and, in case of default, may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as a continuing contract, the engagement will be deemed to be abandoned by mutual consent. The Roman law very properly considered the term of two years amply sufficient for the duration

Lorsq'un père fiance sa fille à quelqu'un, la fille, qui est présent, et qui ne contredit à ce que fait son père, est censée consentir tacitement aux fiançailles. Pott. Marriage, Part 2, ch. 1, No 30. Quæ patris voluntati non

repugnat, consentire intelligitur. Dig lib. 23, tit. 1, l. 12.

(*k*) Potter v. Deboos, 1 Stark. 82.

(*l*) *See* v. Coddington, 8 C. & P 75.

¹ *Ante.*

² *Ante.*

of a betrothment. (*m*) If the time of performance is fixed, and, by bodily disease, it becomes impossible for one party to go through the ceremony without danger to health, this is a valid ground for postponement of performance, on giving notice to the other party. (*n*) If either of the parties puts it out of his or her power to fulfill the contract, by marrying somebody else, there is a breach of the engagement; and a right of action at once attaches. If in such a case the contract was a contract to marry on request, no request need be made, as the defendant by his contract has dispensed with the necessity of it, and rendered it useless. (*o*) So, if there is a promise to marry at a fixed time, and before the time arrives one of the parties absolutely refuses to fulfill the promise, there is a breach, for which an action will lie at once. (*p*)

1354. *Excuses for non-performance.*—If the party making the promise was married at the time it was made, and was consequently incapable of entering into the contract, or of performing it, the incapacity constitutes no excuse for non-performance, unless it was known to the other contracting party at the time the promise was made and accepted. (*q*) Previous insanity and confinement in a lunatic asylum constitutes no excuse for non-performance of a promise of marriage. (*r*) Notwithstanding a promise of marriage proved, if a man has conducted himself in a brutal or violent manner, and threatened to use a woman ill, she has a right to say she will not commit her happiness to such keeping. (*s*)

(*m*) Cod. lib. 5, tit. 1, l. 2.

(*n*) Hall v. Wright, Ell. Bl. & Ell. 759.

(*o*) Short v. Stone, 8 Q. B. 358. Lovelock v. Franklyn, Ib. 378; 15 L. J., Q. B. 145.

(*p*) Frost v. Knight, L. R. 7 Ex.

111; 41 L. J., Ex. 78.

(*q*) Wild v. Harris, 7 C. B. 1004. Millward v. Littlewood, 20 L. J., Ex. 2; 5 Exch. 775.

(*r*) Baker v. Cartwright, 10 C. B. N. S., 124; 30 L. J., C. P. 364.

(*s*) Leeds v. Cook, 4 Esp. 257.

1355. *Conditional promises of marriage.*—If a man promises to marry a woman if she will come from America to England and marry him, or will do any other particular act or thing, there is a sufficient consideration for the promise; and, if the condition precedent is accomplished, if, for instance, the voyage is performed, or the act done, and the woman is ready, and willing, and able to be married to the man, he is responsible for the non-fulfillment of his promise. The validity of conditional promises of marriage will depend upon the reasonableness of the condition and the time limited for its accomplishment. If the marriage is to depend upon the happening of a distant and uncertain event, which may, in all probability, not take place during the lives of the parties, it would be a contract in restraint of marriage. If the condition is a lawful condition, the liability attaches as soon as the condition has been accomplished, (*t*) If it is stipulated that the girl shall have a certain marriage portion, or that the man shall make a certain settlement, the liability upon the contract does not attach until the condition has been accomplished. And, if a reverse of fortune prevents one of the parties from fulfilling the engagement in respect of the portion or the settlement, the other is discharged.

1356. *Fraudulent concealment of material circumstances—Misrepresentation and deceit.*—It is no answer to an action for a breach of promise of marriage to show that the plaintiff at the time of the making of the promise was engaged to marry some one else, and that the pre-engagement was concealed from the defendant, A party is not bound in all cases to disclose such a fact; but the concealment of

(*t*) Harvey v. Johnston, 17 L. J., C. P. 298.

it might, under certain circumstances, amount to a fraud. (*u*) Neither is a party bound to disclose that at some previous period of his life he was of unsound mind, and had been confined in a lunatic asylum. (*x*) If a woman, at the time of the betrothment, was a woman of loose and immodest character, and this was unknown at the time to the man who promised to marry her the latter is entitled, as soon as he discovers her real character, to break off the engagement. General reputation of want of chastity must be established in such a case; (*y*) or, if particular instances of misconduct are relied upon, they must be fully proved. If the circumstances, whatever they may be, were known to the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement. (*z*) If false representations are made by a girl, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune and marriage portion, the fraud is an answer to any action that may be brought for a breach of the promise of marriage. (*a*) But, if the plaintiff herself was no party to the fraud, and made no false representation, and was guilty of no willful suppression of the truth, the defendant can not escape from liability.

1357. *Transfer of property by the lady after a promise of marriage.*—If, after the mutual promises of marriage have been exchanged, the woman makes any conveyance or disposition of any considerable portion of her property without her intended husband's knowledge and concurrence, this is a deception upon

(*u*) *Beachey v. Brown*, Ell. Bl. & Ell. 796; 29 L. J., Q. B. 105.

(*x*) *Baker v. Cartwright*, 10 C. B., N. S., 124.

(*y*) *Foulkes v. Sellway*, 3 Esp. 236.

(*z*) *Irving v. Greenwood*, 1 C. & P. 350. *Young v. Murphy*, 3 Sc. 379; 3 Bing. N. C. 54. *Bench v. Merrick*, 1 Car. & Kirw. 467.

(*a*) *Wharton v. Lewis*, 1 C. & P. 529

the latter, which entitles him to withdraw from the engagement as soon as he is made aware of the circumstance. And, if nothing has been said or agreed upon at the time of the betrothment respecting the settlement to be made on the marriage, and the lady insists on making a settlement of her own private fortune to her separate use, free from the dominion and control of her intended husband, the latter is entitled, if he disapproves of the arrangement, to withdraw from the contract, and to say that he will not marry her upon such terms.

1358. *Accidents and mishaps altering the condition of either of the parties.*—If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease, accident, or mutilation, becomes impotent, he could never maintain an action against a lady for refusing to marry him. (*b*)

1359. *Abandonment of the contract.*—Parties who have exchanged mutual promises of marriage may, of course, at any time before the contract is carried into effect by the performance of the marriage ceremony, dissolve the engagement by mutual consent. *Quæ consensu contrahuntur, contrario consensu dissolvuntur.* (*c*)

1360. *Breach of promise of marriage.*—In an action for breach of promise of marriage, wherein it is laid as special damage, that the defendant debauched

(*b*) Hall v. Wright, Ell. Bl. & Ell. 763; 29 L. J., Q. B. 43.

(*c*) King v. Gillett, 7 M. & W. 55. Poth. Tr. du. Mar. No. 55. As to

evidence of exoneration and discharge from the contract, see Davis v. Bomford, 30 L. J., Ex. 139.

the plaintiff and ruined her character, it would be misdirection to tell the jury that they might give her damages as a solatium for the injured feelings of her parents and family ; but, where the defendant is a person of property, they may take into their consideration not only the plaintiff's pecuniary loss in not becoming his wife, but the injury done to her future prospects of marriage, her injured feelings and affections, and the mortification she must suffer in not being able to look her family in the face. In such an action the damages can not be measured by a known standard, as in commercial cases, but the amount is peculiarly a question for the jury ; and, where no witnesses were called for the defendant, and it appeared that imputations had been cast upon the plaintiff, a person in humble life, and her witnesses, which failed, and the jury gave £2,500 damages against the defendant, who was a person of property, and a new trial was asked for simply upon the ground that the damages were excessive, the application was refused. (*d*)

1361. *Promises of portions and settlements.*—A promise to give a girl a specific sum on her marriage, or to pay money to either the intended husband or wife, or settle property upon them, or either of them, in the event of their marrying, creates a binding obligation in the eye of the law ; for “marriage is one of the strongest considerations in the law to found a contract, gift, or grant.” (*e*) But the promise must be made by a person of full age, and must not be the expression of a mere desire or wish to make a settlement. (*f*) It must also be authenticated, as we have

(*d*) *Berry v. Da Costa*, L. R., 1 C. L. J., Ch. 365.

P. 331 ; 35 L. J., C. P. 191.

(*f*) *Beaumont v. Carter*, 32 Beav

(*e*) *Laver v. Fielder*, 32 Beav. 1 ; 32 586.

before seen, by a note in writing, signed by the promisor or his agent. (*g*) If, therefore, the husband, prior to the marriage, gives a verbal promise to the wife that he will settle her property upon her, she has nothing to rely upon but his honor; and, if, after the marriage, he breaks his word, she has no remedy against him. (*h*) Subsequent marriage is not part performance of a parol contract in consideration of marriage; nor will acts of part performance by the party sought to be charged prevent the operation of the statute. (*i*) But, if a husband writes a letter promising to make a settlement upon his intended wife, or a father, by a letter, promises "to give such a fortune with his daughter to one who shall marry her," this is a sufficient compliance with the requirements of the statute. But the promise must be an absolute promise, and not dependent upon conditions and contingencies remaining unaccomplished. (*k*) To an action upon a covenant made by the defendant in consideration of his daughter's marriage, a plea that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any court, or that either of the parties had elected to treat it as void, is a bad plea. (*l*)

1362. *Fraudulent representations by relations to bring about a marriage.*—Where a mother, who was the absolute owner of certain property, heard her son

(*g*) *Ante*. Randall v. Morgan, 12 Ves. 73. Bawdes v. Amherst, Pr. Ch. 404. Barkworth v. Young, 26 L. J., Ch. 157. Caton v. Caton, L. R. 2 H. L. 127; 36 L. J., Ch. 886.

(*h*) Montacute v. Maxwell, 1 P. Wms. 620. Caton v. Caton, L. R., 1 Ch. 137; 35 L. J., Ch. 292. But see

Williams v. Williams, 37 L. J., Ch. 854.

(*i*) Caton v. Caton, L. R., 1 Ch. 137; 35 L. J., Ch. 292.

(*k*) Bird v. Blosse, 2 Ventr. 361.

Moore v. Hart, 1 Vern. 110. Alt v. Alt, 4 Giff. 84; 32 L. J., Ch. 52.

(*l*) Cavell v. Prince, L. R., 1 Ex. 246; 35 L. J., Ex. 162.

declare to his proposed wife and her guardians, that she (the mother) was only tenant for life of the property, and that the remainder was limited to him after her death, and the mother was privy to the execution of a deed, whereby the son proposed to settle the property, on her death, upon the issue of the marriage, and made no objection to the arrangement, and it afterwards appeared that the mother was not tenant for life, but the absolute owner of such property, and that there was no limitation of it to the son after her decease at the time of the execution of the settlement, the Court of Chancery ordered her to make good the settlement, and execute a conveyance of the property, and clothe the son with the interest which she permitted him to represent that he had at the time of the conclusion of the marriage. (*m*) If, therefore, the relations and friends of parties proposing to be married pretend to settle estates upon them, or to make a provision for them and the children of the marriage, and the nuptials are celebrated upon the faith of such settlements or provision, and under the belief that they have been duly made, and the transaction afterwards turns out to be a cheat, the court will compel the parties who have been guilty of the fraud to make good that which they pretended to do. (*n*) But a representation concerning the fortune, or circumstances, or prospects of a party about to be married, by a relation who does not at the time know that his statement is untrue, and who does not make it fraudulently, and with intent to deceive, will not bind him in equity to make it good. The transaction must amount to a fraud to warrant the interference of the

(*m*) *Hunsden v. Cheyney*, 2 Vern.
150.

(*n*) *Beverley v. Beverley*, Ib. 133.
Prole v. Soady, 29 L. J., Ch. 721.

court, or there must be some writing signed by the party, amounting to a promise to make good the representation. (*o*)

1363. *Ante-nuptial settlements by women engaged to be married* may be made with the knowledge and concurrence of the intended husband. If the woman is in trade, she may convey her stock-in-trade to trustees, to enable her to carry on the business separately from the husband; and, if the latter does not intermeddle with the business, the stock-in-trade will not be liable to be seized for his debts. (*p*) If the woman is a minor, no deed executed by her without the sanction and authority of the Lord Chancellor can bind her, nor can she confirm or ratify the deed after she comes of age, (*q*) although the deed, if executed by her husband, will be binding upon him. If she neglects to inform her intended husband of her intention to make the settlement, it will in general be considered to have been made in fraud of his marital rights; and the court will set it aside. (*r*) A settlement made by a widow of certain property upon the children of a former marriage, during the pendency of a treaty for a second marriage, is fraudulent and void as against the second husband, if he was not informed of the circumstance prior to the celebration of the nuptials. (*s*) But, if a widow has done nothing more than make a fair and reasonable provision for her children, such as

(*o*) *Merewether v. Shaw*, 2 Cox, 124.
Evans v. Wyatt, 31 Beav. 217.

(*p*) *Jarman v. Wolloton*, 3 T. R. 618. *Haslington v. Gill*, 3 Doug. 415. *Dean v. Brown*, 8 D. & R. 95; 5 B. & C. 336. Settlements of goods and chattels require registration. *Fowler v. Foster*, 28 L. J., Q. B. 210. *Antié*.

(*q*) 37 & 38 Vict. c. 62, s. 2.

(*r*) *Howard v. Hooker*, 2 Ch. R. 44. *Lance v. Norman*, Ib. 41. *Prideaux v. Lonsdale*, 1 De G. J. & S. 433. *Downes v. Jennings*, 32 Beav. 290; 32 L. J., Ch. 643. *Carlton v. Earl of Dorset*, 2 Vern. 17. *Goddard v. Snow*, Russ. 485. *Chambers v. Crabbe*, 34 Beav. 457.

(*s*) *England v. Downes*, 2 Beav. 529.

every mother in her situation would morally be bound to make, it has been said that there is no fraud in the case, and no ground for setting aside the settlement. (t) If the settlement has been made prior to the treaty of marriage, there is no ground for impeaching it. And, if, during the betrothment, the woman announces her intention of making the settlement to her intended husband, and the nuptials are celebrated, the settlement will stand good. (u) A husband has no right to disturb a secret settlement made by the wife pending the treaty for the marriage, provided he has by his conduct before marriage put it out of the power of the wife effectually to make any stipulation for the settlement of her property by rendering retirement from the marriage on her part impossible. Thus, where a man seduced a girl during the betrothment, and brought her to his house to cohabit with him, and the girl during the cohabitation made a settlement of her own fortune to the separate use of herself for life, with remainder to her children in equal shares, to the exclusion of any future husband, and was subsequently married to the man with whom she had cohabited, the court refused to set aside the settlement, saying that the woman committed no fraud upon the husband if, when placed under such circumstances, she took the only means she had left her of protecting herself. (x)

1364. *Ante-nuptial settlements by intended husband and wife.*—Property intended to be settled is generally, prior to the marriage, conveyed to trustees, to

(t) *Hunt v. Matthews*, 1 Vern. 408. *Doe v. Lewis*, 11 C. B. 1035. But see, per ROMILLY, M. R., *Downes v. Jennings*, 32 Beav. 290; 32 L. J., Ch. 643, 646.

34; 2 Br. C. C. 350. *St. George v. Wake*, 1 Myl. & K. 617. *Cotton v. King*, 2 P. Wms. 674. *Blithe's case*, 2 Freem. 91.

(x) *Taylor v. Pugh*, 1 Hare, 608

(u) *Strathmore v. Bowes*, 2 Cox, 616.

be holden by them, either for the separate use of the wife, free from the control of the husband, or for the use of the husband and wife jointly, and subsequently of the children of the marriage, with ultimate limitations and provisions, in case there should be no issue. All ante-nuptial settlements, made *bonâ fide* in contemplation of the marriage, are good, both against the husband, and his creditors, and all subsequent purchasers of the property settled. (*y*) Therefore, whenever it is wished to secure a provision for the wife and children which shall remain unaffected by the subsequent insolvency of the husband, the arrangements should be made before marriage, as great difficulties are likely to interpose themselves in the way of an effectual settlement after marriage. If a general power of revocation is reserved in a settlement of realty, or if the exercise of such a power is made to depend upon the consent of persons under the influence and control of the husband, the settlement can not be supported against creditors nor against subsequent purchasers. If the husband reserves to himself the power of charging the land to "the full value," this reservation is tantamount to a general power of revocation, and invalidates the settlement. (*z*) But powers to sell and exchange lands, and re-invest moneys and securities with the consent of trustees, and the usual powers of charging lands to a moderate amount, given *bonâ fide*, will not defeat the settlement. If a settlement is made by parties intending to marry, and who afterwards marry, the settlement can not be revoked before marriage by the intended husband and wife without the consent of the trustees and all the

(*y*) *Campion v. Cotton*, 17 Ves. 263. (*z*) *Tarback v. Marbary*, 2 era. 510.

parties to the settlement. (*a*) A marriage settlement made in London in the Scotch form by parties intending to be married, one of whom is at the time domiciled in Scotland, will be construed in England according to the law of Scotland. (*b*) If the marriage on which the settlement is founded is void, the settlement is void likewise. (*c*)

1365. *Marriage settlements by infants.*—If both the parties to a marriage settlement are infants, the settlement is entirely nugatory, unless it has been made under the sanction and with the authority of the Lord Chancellor, pursuant to the provisions of the 18 & 19 Vict. c. 43; nor can the parties confirm the settlement after they come of age. (*d*) If the male party is of age, and the female party under age, all the leasehold property and general personal estate of the female infant comprised in the settlement will be bound thereby, because such personal estate becomes by the marriage the absolute property of the husband, and the settlement is, in effect, a settlement by the intended husband of the property he is about to acquire by the marriage; but the real estates of inheritance of the female infant are not bound by the settlement, as she has no power of disposition over them during her minority. The courts, however, will not permit the husband to aid her in defeating the settlement, and alienating or disposing of the property; and her act alone during coverture would be ineffectual for the purpose. If she survives the husband, her power over her real estate is the same as if no settlement had ever been made. If the husband survives, he holds

(*a*) *Page v. Horne*, 17 L. J., Ch. 200. 30 L. J., Ch. 884.

(*b*) *Duncan v. Canaan*, 23 L. J., Ch. 265. As to covenants to settle after-acquired property, see *Gray v. Stuart*,

(*c*) *Chapman v. Bradley*, 33 Beav. 65.

(*d*) 37 & 38 Vict. c. 62, s. 2.

such real property for his life, if he had issue by the wife born during the coverture which might by possibility inherit the estate as her heirs; and on his death it descends to the wife's heir-at-law, whatever may be the terms and provisions of the settlement. (*e*) The 18 & 19 Vict. c. 43, renders valid a post-nuptial settlement of an infant's estate made with the approbation of the Court of Chancery. (*f*)

1366. *Settlements of after-acquired property.*—A covenant by the husband alone to settle all property which may accrue to the wife during coverture does not extend to property left to the wife to be at her absolute disposal, free from the control of her husband. (*g*) But if the wife, or the husband and wife, before marriage, have entered into a covenant of this description, the husband is responsible for its fulfillment; and such a covenant may be specifically enforced; (*h*) but it does not bind property settled to the separate use of the wife, so that she has no power of disposition over it, (*i*) nor property bequeathed to husband and wife jointly. (*k*) And, if the covenant to settle the after-acquired property of the wife is on the part of the husband only, the wife is not bound by it. (*l*) Such a covenant is construed to apply only to property acquired during the coverture, although the words "during the coverture" are not inserted in the covenant. (*m*)

(*e*) *Simson v. Jones*, 2 Russ. & M. 376. *Trollope v. Linton*, 1 Sim. & Stu. 485. *Stamper v. Barker*, 5 Mad. 164. *Milner v. Ld. Harewood*, 18 Ves. 259.

(*f*) *Powell v. Oakey*, 34 Beav. 575.

(*g*) *Travers v. Travers*, 2 Beav. 179. *Ramsden v. Smith*, 2 Drew, 302.

(*h*) *Milford v. Peile*, 2 W. R. 181. *Butcher v. Butcher*, 14 Beav. 222. *Peachey on Settlements*, 526.

(*i*) *Coventry v. Coventry*, 32 Beav. 612.

(*k*) *Edye v. Addison*, 1 H. & M. 781; 33 L. J., Ch. 132.

(*l*) *Young v. Smith*, 35 Beav. 87.

(*m*) *Carter v. Carter*, L. R., 8 Eq. 551; 39 L. J., Ch. 268.

1367. *Post-nuptial settlements* by the husband of his own property, or by the husband and wife, of the wife's property, are valid as between the parties to them; (*n*) but they will not prevail over the claims of subsequent purchasers of the settled property, although they bought with knowledge of the settlement, (*o*) unless it has been made pursuant to an agreement in writing, (*p*) entered into with the wife, or her guardians, prior to the marriage, or unless the husband has surrendered his interest in the wife's estate for the sole and exclusive benefit of the wife during coverture. (*q*) Nor will they prevail over the claims of creditors, if it appear that the husband was largely indebted at the time he made it. (*r*) If the debt of a creditor, by whom a voluntary settlement is impeached, existed at the date of the settlement, and it is shown that his remedy is defeated or delayed, it is immaterial whether the debtor was or was not solvent after the making of the settlement. But, if a voluntary settlement is impeached by a subsequent creditor whose debt was not contracted at the date of the settlement, it must be shown that the necessary result of the settlement was to delay, hinder, and defraud the creditors, in which case the law will infer that the settlement was made with that intent; (*s*) and, although a husband may not be in debt at the time he makes the settlement, yet, if the settlement is made long after

(*n*) *Merryweather v. Jones*, 4 Giff. 503.

(*o*) *Ante*. *Gooch's case*, 5 Co. 60, a. *Evelyn v. Templar*, 2 Br. C. C. 148. *Doe v. Manning*, *ante*. *Pulvertoft v. Pulvertoft*, 18 Ves. 84. *Buckle v. Mitchell*, *Ib.* 110. *Johnson v. Legard*, 6 M. & S. 60. *Butterfield v. Heath*, 22 L. J., Ch. 270. *Peter v. Nicholls*, L. R., 11 Eq. 391.

(*p*) *Goldicutt v. Townsend*, 28 Beav. 445.

(*q*) *Hewison v. Negus*, 22 L. J., Ch. 655.

(*r*) *Took v. Tuck*, 12 Moore, 435. *Townsend v. Windham*, 2 Ves. sen. 11. *Ante*.

(*s*) *Freeman v. Pope*, L. R., 5 Ch 538; 39 L. J., Ch. 689. *Bolland, ex parte*, L. R., 7 Ch. 24.

marriage, and not in pursuance of any agreement to make a settlement prior to the marriage, nor in consequence of an accession to the wife's fortune, and the husband becomes indebted to any considerable extent immediately afterwards, the settlement would be considered fraudulent. But it will be otherwise if the husband received property from the wife at the time of the marriage, and made the post-nuptial settlement as a fair and equitable provision for her, he being at the time in solvent circumstances; (*t*) or if the settlement contains a provision for the payment out of the settled property of the husband's debts. (*u*) If the husband, after marriage, conveys his furniture, stock, and moveables, to trustees, for the use of his wife and children, and remains, notwithstanding such conveyance, the apparent possessor and owner of the property, the conveyance so made is *prima facie* a fraud, as regards creditors. (*x*) But the possession by the husband and wife of property, stock-in-trade, and furniture, limited to the separate use of the wife before marriage, is no badge of fraud, and does not render it liable to be seized for the husband's debts. (*y*) Where an attorney, being in insolvent circumstances, assigned the good-will of his business in consideration of a sum of money paid down, and an annuity, secured by bond, to be paid to his wife for life, with remainder to himself for life, it was held that the settlement of the annuity was void as against creditors. "This," observes WOOD, V. C., "is in effect a contract by which the debtor is making sale of his property by

(*t*) *Re Hanlon*, 23 Law. T. R. 212.
Lush v. Wilkinson 5 Ves. 384. *Battersbee v. Farrington*, 1 Swanst. 106.
Holloway v. Millark, 1 Mad. 419.
Nunn v. Wilsmore, 8 T. R. 529.
 (*u*) *Gorge v. Milbanke*, 9 Ves. 194.

(*x*) *Ante*. *Arundel v. Phipps*, 10 Ves. 139.

(*y*) *Jarman v. Woolloton*, 3 T. R. 618. *Cadogan v. Kennett*, 2 Cowp. 436. *Haselinton v. Gill*, *Ib.* 620, *u.*; 3 Doug. 415.

means of a covenant that he will abstain from carrying on business, and taking a settlement of the purchase-money upon his wife for life for her separate use, with the immediate remainder to himself for life, the whole object plainly being to obtain the benefit of the entire property for his own use and advantage."

(z) An ante-nuptial settlement is voluntary so far as it is made in favor of collaterals. (a)

1368. *Post-nuptial settlements in fulfillment of an ante-nuptial contract in writing* (b) will prevail against the claims both of creditors and purchasers. (c) And so also will a settlement made by the husband in consequence of the relinquishment by the wife of her jointure, or dower, or property over which she has a power of disposition or appointment, (d) or made in consideration of a new portion, or addition to her portion, to be given to the wife by her relations. (e) But the amount and value of the property so settled must not be greatly disproportioned to the value of the consideration received by the husband, or the transaction will, if the husband is indebted at the time, or shortly afterwards becomes insolvent, be considered fraudulent, and the husband's creditors will be let in. A wife may contract in equity with her husband for a post-nuptial settlement upon her of her own property for a valuable consideration, and the husband may be a purchaser from the wife where property belonging to her is the subject of the settle-

(z) Neale v. Day, 28 L. J., Ch. 45.
French v. French, 6 De G. M. & G. 102.

(a) Smith v. Cherril, L. R., 4 Eq. 390; 36 L. J., Ch. 738.

(b) Goldicutt v. Townsend, 28 Beav. 445.

(c) Dundas v. Dutens, 1 Ves. jun. 196.

(d) Ward v. Shallett, 2 Ves. sen. 17. Anon., Pre. Ch. 102. Cottle v. Fripp, 2 Vern. 220.

(e) Russel v. Hammond, 1 Atk. 13; Ib. 190. Colville v. Parker, Cro. Jac. 158. Ramsden v. Hylton, 2 Ves. sen. 308; Ib. 18. Jones v. Marsh, Cases Eq. Talbot, 64. Wheeler v. Caryl, Amb. 121.

ment, so that, if the settlement is a bargain for value between the husband and wife, it is sustainable against creditors. (*f*) The 18 & 19 Vict. c. 43, renders valid a post-nuptial settlement of an infant's estate, made with the approbation of the Court of Chancery. (*g*)

1369. *Of the wife's right to a post-nuptial settlement.*—If, after the marriage, the wife is unable to live with the husband in consequence of his misconduct, she has a right, as against him, to have her own property and unrecovered choses in action settled upon her. (*h*) She has a right, also, in certain cases, to a settlement upon her of her own property, as against the assignees of the husband in bankruptcy, and even against a particular assignee claiming under an assignment from both the husband and wife for a valuable consideration. (*i*)

1370. *Contracts in fraud of settlements and promises of marriage portions.*—Any private underhand agreement or treaty entered into for the purpose of infringing or defeating an open, public agreement, made in consideration of marriage, is fraudulent and void. (*k*) A bond, for example, given by the husband to return part of his wife's marriage portion, without the privity of his own parents and guardians, and of all the parties to the treaty of marriage, is fraudulent and void, and can not be enforced against him. If the father, or any other relation or friend of the husband or wife, who has agreed to make a settlement of property upon one or both of them on their marriage,

(*f*) *Hewison v. Negus*, 22 L. J., Ch., 655. *Harman v. Richards*, Ib. 1066.

(*g*) *Powell v. Oakley*, 35 Beav. 575.

(*h*) *Barrow v. Barrow*, 24 L. J., Ch. 198.

(*i*) *Scott v. Spashett*, 3 Mac. &

Gord. 603. *Dunkley v. Dunkley*, 2 De G. Mac. & G. 390. *Re Kincaid*, 22 L. J., Ch. 395.

(*k*) *Kemp v. Coleman*, 1 Salk. 156. *Turton v. Benson*, 2 Vern. 764. *Pitcairn v. Ogbourne*, 2 Ves. sen. 380; 1 Ves. sen. 277.

or to give a marriage portion to the wife, takes a bond or covenant from either the husband or wife, or both of them, to repay the whole or any part of such marriage portion, or to re-convey an estate granted or intended to be granted, the contract is void, as being a fraud upon the parties to the treaty of marriage, and upon the parents and guardians who had a right to give or withhold their consent to the marriage. (*l*)

If the relations of a woman furnish her with money, in order that she may appear to have a considerable marriage portion, and secretly take from her a bond or covenant to repay the money advanced after her marriage, the bond is void. (*m*) So, if a relation or friend of the husband advances him money, or clothes him with the apparent possession of property, to enable him to make a show of wealth in order to obtain a corresponding portion with his wife, and takes from such husband a bond or covenant for the repayment of the money advanced, or the surrender of the property intrusted to him, the bond or covenant will be void, and the husband will be entitled to hold the property for his own use, notwithstanding that he was himself a party to the deceit. (*n*) Where a widow, on the marriage of her son, agreed with the intended wife's relations to make a settlement on him and his wife and the children of the marriage, of certain lands which she had in jointure, but she at the same time obtained a secret agreement from her son to pay her an annuity, it was held that this agreement was fraudulent and void. (*o*) If a man about to be married is

(*l*) 1 Eq. Abr. 88, E. 3. *Peyton v. Bladwell*, 1 Vern. 240. *Scott v. Scott*, 1 Cox, 367. *Palmer v. Neave*, 11 Ves. 165. *Morrison v. Arbuthnot*, 8 Br. P. C. 247; 1 Br. Ch. C. 548 n.

(*m*) *Gale v. Lindo*, 1 Vern. 475.

(*n*) *Thompson v. Harrison*, 1 Cox, 346. *Webber v. Farmer*, 4 Br. P. C. 170.

(*o*) *Lamlee v. Hanman*, 2 Vern. 465, 499.

largely indebted, and a relation comes forward and pays off his debts in order to enable him to gain the consent of the parents of the lady to the match, and at the same time takes a bond from the lady and her intended husband to pay him a certain sum within a specified period from the celebration of the nuptials, the bond is a fraud upon the parents, and the husband and wife are entitled, after the marriage, to set it aside, although they were both parties to the fraud. (*p*)

Joseph Montefiori being engaged in a treaty of marriage, his brother Moses, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money as the balance of accounts between them, which balance he (Moses) acknowledged to have in his hands, though in truth no such balance nor anything like it existed. After the marriage had been celebrated, Moses reclaimed the note as having been given without consideration; but the court held that Joseph was entitled to the note, and that Moses should not be permitted to take advantage of his own fraud, although his brother was in collusion with him. (*q*) Upon the same principle, creditors who conceal wholly, or in part, debts due to them from a man about to be married, and represent that he is not indebted, or is only indebted to them to a less amount, in order to serve the turn of their debtor and get the parents of the woman to consent to the marriage, will be bound by such fraudulent representations, and will be barred from all remedy for obtaining payments of their debts, just as effectually as if they had executed a release under seal. (*r*)

(*p*) *Redman v. Redman*, 1 Vern. 347.

(*q*) *Montefiori v. Montefiori*, 1 W. Bl. 363. *Money v. Jorden*, 21 L. J.,

Ch. 531. *Maunsell v. White*, 22 Law T. R., H. L. 293.

(*r*) *Neville v. Wilkinson*, 1 Br. Ch. 543. *Eastbrooke v. Scott*, 3 Ves. 460; 16 Ves. 125.

1371. *Effect of adultery on marriage settlements.*

—If a marriage settlement is valid when executed, the wife does not, according to the common law, lose by reason of adultery any benefit the settlement confers upon her; (s) but the 20 & 21 Vict. c. 85, s. 45, enables the Divorce Court, when it has pronounced sentence of divorce by reason of the adultery of the wife, to deal with the settled property of the wife. (t)

1372. *Costs of marriage settlements.*—The usage of the profession is “that the lady’s solicitor shall prepare the settlement and that the gentleman shall have the privilege of paying for it.” (u)

1373. *The marriage contract, its nature and requisites.*—Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others. (x) The marriage contract itself is founded on the consent of the parties, and ranges amongst that class of contracts called consensual contracts. Consent of parents and guardians was, by the 26 Geo. 2, c. 33, and 4 Geo. 4, c. 17, made essential to the validity of all marriages of minors by license (not being widowers or widows, who were deemed to be emancipated), so that, after a marriage had been actually celebrated and consummated, and followed by the procreation of children and a lengthened cohabitation, it might be annulled by the ecclesiastical court, and declared void ab initio, by reason of the want of such consent prior to the celebration of the nuptials. (y) But this was found to be productive of so much mischief that these Acts

(s) *Evans v. Carrington*, 30 L. J. Ch. 364.

(t) *Stone v. Stone*, 3 S. & T. 372. *Laurence v. Laurence*, *Ib.* 207. And see the 23 & 24 Vict. c. 144, s. 6.

(u) *Helps v. Clayton*, 17 C. B. N. S., 553; 34 L. J., C. P. 1.

(x) *Hyde v. Hyde*, L. R. 1, P. & M. 130; 35 L. J., P. & M. 57.

(y) *Harrison v. Southampton*, 22 L. J., Ch. 722.

were repealed; and it has now been enacted that after the marriage has been actually solemnized, it shall not be necessary in support of such marriage to give any proof of the residence of the parties previous to the marriage within the district where the marriage was solemnized, or of the consent of any person whose consent to the marriage is required by law, and that no evidence shall be given to prove the non-residence or non-consent in any suit touching the validity of such marriage. (z)

1374. *Of the age of consent.*—The age of consent to marriage is fourteen in males and twelve in females. If, however, a boy under fourteen, or a girl under twelve, actually go through the form of marriage, such marriage is not absolutely void; it is inchoate and imperfect only. If, on arriving at the age of consent, they cohabit, or continue a cohabitation previously begun, the marriage is a good marriage, by reason of the subsequent ratification of the contract. "The time of agreement or disagreement when they marry *infra annos nubile* is, for the woman, at twelve or after, and for the man, at fourteen or after; and there need be no new marriage if they so agree. But disagree they can not before the said ages; and then they may disagree and marry again to others without any divorce; and, if they once after give consent, they can never disagree after." (a)

1375. *Presumption of marriage.*—Where the form of marriage has been gone through, it will be presumed that all the requisites of a valid marriage have occurred until the contrary be shown; and,

(z) 6 & 7 Wm. 4, c. 85, s. 25. 4 c. 56, s. 3. 19 & 20 Vict. c. 119, s. 17.
 Geo. 4, c. 76, ss. 16, 26. R. v. Birmingham, 8 B. & C. 29. 7 & 8 Vict. (a) Co. Litt. 79 a, 79 b. 1 Rolle Abr. 341.

where there has been cohabitation as man and wife, the law presumes marriage until the contrary be proved. (*b*)

1376. *Void marriages.*—All marriages celebrated after the 31st of August, 1835, between persons within the prohibited degrees of affinity are absolutely void. (*c*) If a widower, therefore, goes through the marriage ceremony with the sister of his deceased wife, or a widow with the brother of her deceased husband, the ceremony is a mere form, and will be productive of no legal marriage between the parties. (*d*) It has been enacted that, if any persons knowingly and willfully intermarry in any other place than a church or chapel, or registered building, or the registrar's office, without license, or due publication of banns, or due notice to the superintendent-registrar, or without certificate of notice duly issued, or in the absence of a registrar or superintendent-registrar, where the presence of a registrar or superintendent-registrar is necessary, the marriage of such persons shall be absolutely null and void. (*e*) But it must be shown that both parties have knowingly and willfully disregarded the provisions of the Marriage Acts. If the disobedience and misconduct are on one side only the marriage is not invalid. (*f*) And by the 19 & 20 Vict. c. 119, s. 17, it is enacted that, after any marriage shall have been solemnized under the authority of the 6 & 7 Wm. 4, c. 85, the 1 Vict. c. 22, and the 3 & 4 Vict. c. 72, it shall not be necessary in support of such marriage to give any proof that the registered building in which any mar-

(*b*) *Sichel v. Lambert*, 33 L. J., C. P. 137; 15 C. B., N. S., 781.

(*c*) 5 & 6 Wm. 4, c. 54.

(*d*) *Reg. v. Chadwick*, 11 Q. B. 173, 205; 15 C. B., N. S., 781.

(*e*) 4 Geo. 4, c. 76, s. 22. 6 & 7 Wm.

4, c. 85, s. 42. *Reg. v. Millis*, 10 Cl. & Fin. 534; 7 Jur. 911. *Catherwood v. Caslon*, 13 M. & W. 261.

(*f*) *Wright v. Elwood*, 1 Curt. 49 662. *Dormer v. Williams*, *Ib.* 874.

riage may have been solemnized had been certified as a place of religious worship, or that it was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit touching the validity of the marriage.

1377. *Publication of banns and celebration of marriage in a false name.*—If banns have been published in a false name, with the knowledge of both the parties to the marriage contract, for purposes of fraudulent concealment, the marriage will be invalid ; (*g*) but no court of justice, ecclesiastical or civil, will lend its aid to enable a man who has concealed his true name at the time of the publication of the banns, or has purposely procured the banns to be published in false names, without the knowledge of the woman he was about to marry, to turn round upon her and annul the marriage and bastardize his children on the ground that he had knowingly and willfully evaded the provisions of the Marriage Acts. Thus, where James Carpenter, being about to marry Susan Spencer, procured the banns to be published in the names of James Carpenter and Agnes Watts, and she was married in the name of Agnes Watts, but she did not know, until after the marriage had been solemnized and consummated, that the banns had been published in a wrong name, and that she had been married in a wrong name, it was held that she was lawfully married, notwithstanding the misnomer. (*h*) If one of the parties to the marriage contract has assumed a false name and description, and procured the publication

(*g*) *Midgley v. Wood*, 30 L. J., P. & M. 57. It must be shown that both parties knowingly and willfully concurred. *Gompertz v. Kensit*, L. R., 13 Eq. 369 ; 41 L. J., Ch. 382.

(*h*) *Rex. v. Wroxtton*, 4 B. & Ad. 640 ; 1 N. & M. 712. *Rex. v. Billingshurst*, 3 M. & S. 257. *Pougett v. Tomkyns*, *Ib.* 261 n.

of the banns and the celebration of the marriage in such false name, for the purpose of concealing his or her real estate and condition in life, the other party who has been deceived, and who has thus been induced to go through the marriage ceremony with a person who is substantially a different person from what was thought and expected at the time, is entitled to a declaration of the nullity of the marriage from the ecclesiastical court. (*i*) If the error is not a mere error nominis, or misnomer, but an error de corpore, or de personâ, the contract is voidable as to the party who has been deceived, from want of consent ; but, if it is a mere misnomer, and the party has married the person that he or she all along intended to marry, the mere verbal mistake will not suffice to invalidate the marriage. (*k*) Numerous cases have occurred where, in the publication of banns, there has been a partial departure from the true name, and the marriage has, notwithstanding, in the absence of fraud, been held to be valid on the ground that the name, though incorrect, designated the right person. (*l*)

1378. *Marriage by license in a false name* is not of the same importance as marriage by banns in a false name. A mere misdescription or misnomer of the parties in the license will not avoid the marriage, provided the incorrect name represents the right person. (*m*) But, if any fraud or intentional deception has been practiced with the knowledge and connivance of both parties upon the ordinary, " if, for instance, a license were obtained for one person with the inten-

(*i*) *Frankland v. Nicholson*, 3 M. & S. 261, n. *Midgley v. Wood*, 30 L. J., P. & M. 57.

(*k*) *Clowes v. Clowes*, 3 Curt. 190.

Rex v. Burton-on-Trent, 3 M. & S. 538.

(*l*) *Sullivan v. Sullivan*, cited *Bevan v. M'Mahon*, 30 L. J., P. & M. 71.

(*m*) *Bevan v. M'Mahon*, *ut sup.*

tion that it should be used for another, such a license would not be valid." (*n*)

1379. *Fraudulent celebration of a sham marriage.*—A party can not avail himself of his own fraud to annul an apparent marriage. If a man has imposed a pretended clergyman and a supposititious license upon a young unmarried woman, the court will not at his instance annul the apparent marriage. (*o*) If persons, professing to marry according to the rites of the Church of England, knowingly or willfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriage is null and void. (*p*)

The law of the country where a marriage is solemnized does not always determine the validity of the marriage. If foreigners domiciled abroad come to England and get married in conformity with English law, the marriage will be a valid marriage here, though it be null and void by the law of France. (*q*) A marriage celebrated in France, on the other hand, may be valid in this country, though it is invalid according to French law. (*r*)

Whenever any attempt is to be made to invalidate a marriage, parties must not slumber over their rights, for "everything," observes Sir WILLIAM SCOTT, "is to be presumed in favor of a matrimonial union which has produced children, and united parties by a long cohabitation; such an union is not to be dissolved, unless by some pressing obligation of law." (*s*)

1380. *Of the husband's right to rents and profits of the wife's lands.*—The husband is so far master of

(*n*) Lane v. Goodwin, 4 Q. B. 366.

(*o*) Hawke v. Corry, 2 Hag. Con-
sist. 288.

(*p*) 4 Geo. 4. c. 76, s. 22

(*q*) Simonin v. Mallac, 29 L. J., P
& M. 97.

(*r*) Este v. Smith, 18 Beav. 121.

(*s*) Diddear v. Faucit, 3 Phil. 581.
Piers v. Piers, 2 H. L. C. 367. Field's
Mar., &c., lb. 48.

the estates of freehold and inheritance belonging to the wife at the time of her marriage, and not settled to her separate use, as to be entitled to receive the profits of them during his life, and to sue upon all covenants running with the land entered into with the wife or her ancestors; but he can not dispose of the estates, or convey them away, except for the joint lives of himself and his wife, (*t*) without the concurrence of the wife, who must execute the deed of conveyance and make the prescribed acknowledgment thereof before properly appointed officers, a certificate of that acknowledgment being filed of record in the Court of Common Pleas. (*u*) But the marriage operates as a gift in law to the husband of all the wife's chattels real, or leasehold estates; also of all estates by statute merchant, statute staple, and eligit. The husband may, consequently, sell them or mortgage them without the sanction or concurrence of the wife. He may also forfeit them; and they may be extended and sold for his debts. (*x*)

The husband is entitled to the profits during his life of any estates of freehold and inheritance, and to any personalty absolutely, which may come to the wife during the coverture, and which are not settled to her separate use, unless the marriage took place after the 9th of August, 1870, and the property came to the wife from an intestate, or is a sum of money not exceeding £200, coming to her under a deed or will, in which case the said property or sum of money will, subject and without prejudice to the trusts of any settlement affecting the same, belong to the wife

(*t*) *Robertson v. Morris*, 11 Q. B. 916.

(*u*) *Jolly v. Hancock*, 7 Exch.

(*x*) *Bac. Abr. Baron and Feme*, C 2. *Co. Litt.* 466. *Plowd.* 192. *Doe v. Polgreen*, 1 H. Bl. 535.

for her separate use, and her receipts alone will be a good discharge. (*y*)

In all actions for a profit or demand accruing during coverture in respect of the real estate of the wife, the husband and wife may join, or the husband may sue alone, as in debt, for not setting out tithes belonging to the wife, (*z*) and so for rents and services accruing to the husband during the coverture, either in respect of the real estate of the wife, or as annexed to a reversion granted to the husband and wife jointly. But, if a husband alone demises his wife's lands for a term of years for a certain rent, the wife can not be joined with him as co-plaintiff in an action for the recovery of the rent. The husband is alone entitled to distrain for the rent; and the tenant is bound to deliver up the land to him at the expiration of the term. (*a*)

Formerly the husband was entitled to the fruits of the wife's labor, but by the Married Women's Property Act, 1870, (*b*) s. 1, the wages and earnings of any married woman acquired or gained by her after the passing of that Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, are to be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone will be a good discharge for such wages, earnings, money, and property. (*c*)

(*y*) 33 & 34 Vict. c. 93, ss. 7, 8.

Harcourt v. Wyman, 3 Exch. 824

(*z*) Beadle v. Sherman, Cro. Eliz. 608, 613.

Parry v. Handle, 2 Taunt. 180.

(*b*) 33 & 34 Vict. c. 93.

(*a*) Wallis v. Harrison, 5 M. & W.

(*c*) And see sects. 2, 3, 4, 5 & 11.

142. North v. Wyard, 2 Bulst. 233.

Formerly the husband acquired by the marriage power of reducing any of his wife's choses in action into possession. (*d*) But by the Married Women's Property Act, 1870, (*e*) s. 2, notwithstanding any provision to the contrary in the 10 Geo. 4, c. 24, enabling the commissioners for the reduction of the national debt, to grant life annuities for terms of years, or in the Acts relating to savings banks, and post-office savings banks, any deposit thereafter made, and any annuity granted by the said commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, is to be deemed to be the separate property of such woman, and the same is to be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of money of her husband without his consent, the court may, upon an application under sect. 9 of that Act, order such deposit or annuity, or any part thereof, to be paid to the husband. By sect. 3, any married woman, or any woman about to be married, may apply to the governor and company of the Bank of England, or to the governor and company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than £20, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to, or made to stand in, the books of the governor and company to whom such application is made, in the name or intended name of the woman as a mar-

(*d*) *Ante*.(*e*) 33 & 34 Vict. c. 93.

ried woman entitled to her separate use ; and on such sum being entered in the books of the said governor and company accordingly, the same is to be deemed the separate property of such woman, and is to be transferred and the dividends paid as if she were an unmarried woman ; provided that if any such investment in the funds is made by a married woman by means or moneys of her husband without his consent, the court may, upon an application under sect. 9, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband. By sect. 4, any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint-stock company that any fully paid-up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman, as a married woman, entitled to her separate use, and it will be the duty of such directors or managers to register such shares or stock accordingly, and the same, upon being so registered, is to be deemed to be the separate property of such woman, and is to be transferred, and the dividends and profits paid, as if she were an unmarried woman ; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under sect. 9, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. By sect. 5, any married woman, or any woman about to be married, may apply in writing to the committee of management of

any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society, in the name or intended name of the woman as a married woman entitled to her separate use, and it will be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim is to be deemed to be the separate property of such woman, and is to be transferable and payable, with all dividends and profits thereon, as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the court may, upon an application under sect. 9, order the same, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. By sect. 6, nothing thereinbefore contained in reference to moneys deposited in or annuities granted by savings banks, or moneys invested in the funds, or in shares or stocks of any company shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if that Act had not passed. By sect. 10, a married woman may effect a policy of insurance upon her own life, or the life of her husband, for her separate use; and the same and all benefit thereof, if expressed on

the face of it to be so effected, will enure accordingly, and the contract in such policy will be as valid as if made with an unmarried woman. By the same section, a policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, is to enure and be deemed a trust for the benefit of his wife, for her separate use, and of his children, or any of them, according to the interest so expressed, and will not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee will be a good discharge to the office. If it is proved that the policy was effected, and premiums paid by the husband, with intent to defraud his creditors, they will be entitled to receive out of the sum secured an amount equal to the premiums so paid.

1381. *Gifts from the husband to the wife.*—A gift may be made by a husband to his wife, which will be supported in equity; and the husband will be held to be a trustee for his wife of property which he has given to her, or purchased for her with her own moneys; (*f*) but the gift must be complete. (*g*)

1382. *Liability of the husband of a feme covert*

(*f*) *Mews v. Mews*, 15 Beav. 529. *kin v. Darkin*, 22 Law T. R. 278, Ch. Murray v. Glasse, 17 Jur. 816. (*g*) *Price v. Price*, 21 L. J. Ch. 53.

executrix.—A husband is liable for all the assets received, and for any devastavit committed, either by himself or his wife, during the coverture, in respect of an estate of which his wife was legal personal representative. (*h*)

1383. *Release by marriage*.—If a creditor marries his debtor, the debt is released and extinguished by the confusion of persons; but a contract not broken and not converted into a chose in action at the time of the marriage, or during the coverture, will not be released by the marriage. Consequently, if a man, in contemplation of marriage, enters into a contract in writing with his intended wife, to the effect that his heirs or executors shall, after his decease, pay her a certain sum of money in case she should survive him, this contract is not released and discharged by the marriage. Therefore a bond, the condition of which can not be broken during coverture, is not extinguished by the marriage of the obligor and obligee. (*i*) And such contract will be enforced when it would be in furtherance of the manifest intention and object of the parties to do so, as in the case of an agreement by persons about to marry, for the mutual settlement of their estate, or of the estate of either of them, on the other, on the marriage. “If a woman executrix marries the debtor, it is no release in law, because she has the debt in another right; and, if it should amount to a release in law, it would amount to a devastavit, which is a wrong which the law will not suffer.” (*k*) Therefore, if the executrix of the obligee of a bond marry the obligor, there is no release of the debt: and after the death of such executrix an action may be maintained in respect of

(*h*) *Smith v. Smith*, 21 Beav. 387.

515; 1 Salk. 325. *Dolling v. White*

(*i*) *Milbourn v. Ewart*, 5 T. R.

22 L. J., Q. B. 328.

385. *Cage v. Acton*, 1 Ld. Raym.

(*k*) *Needham's case*, 8 Co. 136, a.

it by the administrator de bonis non. (*l*) Where a man covenanted to pay a woman an annuity for her separate use free from anticipation, and afterwards married her, it was held that the annuity was only suspended by the marriage and that the widow was entitled to recover arrears accrued subsequent to the death of the husband. (*m*)

1384. *Deeds of separation.*—The husband and wife can not by contract between themselves change their legal capacities or characters. (*n*) When, therefore, by reason of matrimonial differences, they wish to live separate upon certain terms, it is necessary that a trustee should be appointed to contract with the husband for that purpose. (*o*) The husband may covenant with any third party to pay to him a certain sum of money for the separate use of the wife, either for a term of years or during her natural life, provided the covenant is absolute and unqualified, and the performance of it is not made to depend upon the contingency of a future separation, or made conditional upon the wife's consent to live separate. (*p*) If it appears by the deed that the separation is not a present, immediate, and actually accomplished separation, but is subsequently to be carried into effect, the contract will be void, as being contrary to the public policy of the law. (*q*) A covenant by the trustee to indemnify the husband against debts and expenses contracted by him and his wife, during the time they were cohabiting

(*l*) Wankford v. Wankford, 1 Salk. 306.

(*m*) Fitzgerald v. Fitzgerald, L. R., 2 P. C. 83; 37 L. J., P. C. 44.

(*n*) Co. Litt. 112, a. Ewers v. Hut-
ton, 3 Esp. 254. Garth v. Earnshaw,
3 Y. & C. 584. Ld. St. John v. Ly.
St. John, 11 Ves. 530.

(*o*) Sanders v. Rodway, 16 Jur.
1005. Hunt v. Hunt, 31 Beav. 89.

(*p*) Clough v. Lambert, 10 Sim.
178. Bostock v. Hume, 7 M. & Gr.
893. Logan v. Birkett, 1 Myl. & K.
225.

(*q*) Westmeath v. Salisbury, 5 Bl.,
N. S., 393. Hindley v. Westmeath, 6
B. & C. 200.

together, as well as against debts that may subsequently be contracted by her, is not, in contemplation of law, a covenant or engagement to pay money as an inducement for a separation, and is not, consequently, void. (*r*) If the husband has been induced to execute the separation deed by fraudulent misrepresentation or fraudulent concealment on the part of the trustee, the deed will be invalid, and the husband can not be sued upon it. (*s*) All contracts for the prevention of cohabitation between husband and wife are null and void, (*t*) unless it appears that the husband has by cruelty or misconduct forfeited his marital rights. (*u*) An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, has been decreed to be specifically performed. (*x*)

1385. *Subsequent reconciliation* puts an end to the husband's covenant to pay an annuity to the wife, (*y*) unless it is provided that a subsequent cohabitation shall in no wise alter or affect such liability. (*z*) If the husband has not forfeited his marital rights by his own misconduct, he may discharge himself from his

(*r*) *Jones v. Waite*, 7 Sc. 328; 5 Sc. N. R. 951. *Summers v. Ball*, 8 M. & W. 596.

(*s*) *Evans v. Edmonds*, 22 L. J., C. P. 211; 13 C. B. 777. *Evans v. Carrington*, 30 L. J., Ch. 364. But see *Kendall v. Webster*, 1 H. & C. 440; 31 L. J., Ex. 492.

(*t*) *Wren v. Bradley*, 17 L. J., Ch. 172. *Cartwright v. Cartwright*, 22 Ib. 841.

(*u*) *Westmeath v. Westmeath*, 2

Hagg. Eccles. Sup. 115. *Swift v. Swift*, 34 L. J., Ch. 209.

(*x*) *Gibbs v. Harding*, L. R., 5 Ch. 336; 39 L. J., Ch. 374. And see the 36 Vict. c. 12, s. 2.

(*y*) *Ld. St. John v. Ly. St. John*, 11 Ves. 537. *Bateman v. Ross*, 1 Dow. 245.

(*z*) *Wilson v. Mushett*, 3 B. & Ad. 751. *Webster v. Webster*, 22 L. J., Ch. 837.

liability thereon by offering to receive back the wife, (a) unless he has covenanted absolutely and unconditionally with the trustee to pay the annuity during the life of the wife, (b) in which case his liability to pay the annuity is not discharged by the subsequent commission of adultery by the wife, or by a decree for a judicial separation pronounced in consequence of such adultery. (c) When a separation has taken place, and property has been settled upon the wife and children of the marriage, for their support, the settlement will be upheld against the future creditors of the husband, unless it appears that the separation was illusory and without adequate cause. (d)

1386. *Wife's right of action after separation.*—By the Married Woman's Property Act, 1870, (e) sect. 11, a married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property, by that Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property; and she will have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman. When the husband and wife are

(a) *Whorewood v. Whorewood*, Ch. C. 250.

(b) *Seeling v. Crawley*, 2 Vern. 386.

(c) *Baynon v. Batley*, 1 M. & Sc. 329; 8 Bing. 256. *Jee v. Thurlow*, 2 B. & C. 551; 4 D. & R. 11. *Sea-*

grave v. Seagrave, 13 Ves. 439.

(d) *Hobbs v. Hull*, 1 Cox, 445.

Nunn v. Wilsmore, 8 T. R. 529,

Stephens v. Olive, 2 Br. C. C. 90.

(e) 33 & 34 Vict. c. 93

living separate the wife may bring an action against the husband, in the name of the trustees of the deed of separation, if the latter refuses to carry out the trusts of the deed, on tendering an indemnity against costs. (*f*) Where the husband, in a deed of separation, agreed to allow the wife to enjoy certain separate estate and property, and covenanted that he would ratify all proceedings in his name for obtaining the property, and the wife brought an action on a note in the name of her husband and herself, and the husband released the debt, the court ordered the release to be given up to be canceled. (*g*)

1387. *Effect of a decree for a divorce.*—After a decree of divorce, the choses in action of a wife which have not been reduced into possession by the husband belong to her absolutely. (*h*)

1388. *Effect of a decree for a judicial separation.*—After a decree for a judicial separation the wife's choses in action, not reduced into the husband's possession before the decree, become her absolute property. (*i*) Where a married woman, entitled to a reversionary interest in personalty, has joined with her husband in mortgaging such interest, and has afterwards obtained a decree for judicial separation, and is living apart from her husband, on the property coming into possession she is entitled to it absolutely under the 20 & 21 Vict. c. 85, s. 25. (*k*)

1389. *Dissolution of the coverture by death.*—*The husband's rights by survivorship.*—If the coverture

(*f*) Morgan v. Thomas, 2 C. & M. 344.
388. Auster v. Holland, 15 L. J., Q. B. 229.

(*g*) Innell v. Newman, 4 B. & Ald. 419.
Chambers v. Donaldson, 9 East, 471

(*h*) Wells v. Malbon, 31 L. J., Ch.

(*i*) Johnson v. Lander, L. R., 7 Eq. 228; 38 L. J., Ch. 229.

(*k*) Insole, *in re*, L. R., 1 Eq. 470; 35 L. J., Ch. 177. And see Prole v. Soady, L. R., 3 Ch. 220; 37 L. J., Ch.

246.

be dissolved by the death of the wife, and the husband becomes tenant by the courtesy of the wife's estates of inheritance, he is clothed with the interests in all real contracts or covenants annexed to such estates. But, upon real contracts annexed to the wife's estates of freehold and inheritance of which he is not tenant by the courtesy, but which descend after her death upon her heir-at-law, the husband can maintain no action, although such contracts have been entered into during the coverture with both husband and wife jointly. (*l*) If during coverture a lease be made by husband and wife according to the provisions of the 32 Hen. 8, c. 28, s. 3, containing a covenant from the lessee to pay rent to the husband and wife and the heirs of the wife, and the surviving husband brings an action on the covenant for non-payment of the rent, the action may be defeated by a plea showing that the demised premises were the property of the wife, and that the plaintiff never had any estate in them but in right of his wife, and that she died without issue before the rent became due, leaving A. her heir-at-law, who claimed the rent. (*m*) But all "fruits fallen" during the coverture, such as a relief due in right of the wife's manor or seignory, arrears of a rent-charge granted, either to the wife alone, or to the husband and wife jointly, and all arrears of rent due at the death of the wife, are recoverable by the husband in his own right. For all breaches of covenants, also, not in the nature of continuing breaches, where the ultimate damage has accrued during the coverture, the husband may maintain an action in his own right after the death of his wife, although the lands have descended to her heir-at-law. If, too, the surviving husband was seized during coverture of a rent-charge

(*l*) *Blake v. Foster* 8 T. R. 487.(*m*) *Hill v. Saunders*, 7 D. & R. 17.

in fee, fee-tail, or for life, in right of his wife, he may by statute sue in his own name for arrears which accrued before the marriage, as well as for such as accrued during the coverture. (n)

1390. *Recovery by the surviving husband of money and property belonging to his deceased wife.*—

If a debt by bond be due to a feme sole, who afterwards marries, and the husband makes a letter of attorney to a third party to receive the money, who receives it accordingly, and the wife dies, the husband shall have an action in his own right for this money; for by the receipt the property therein becomes vested in the husband. So, if a legacy devised to a married woman be actually received by an attorney or agent, duly appointed for that purpose by the husband alone, or by the husband and wife jointly, it is thenceforth no longer a chose in action of the wife, but money had and received to the use of the husband, who may sue for it, after the death of his wife, in his own right

(o) The surviving husband was also formerly entitled, to the wife's savings from her own separate income, given or lent by her in her lifetime to her relations or friends, and might maintain an action for the recovery of all such money, although by the terms of the settlement she was to enjoy it free from all control or interference on the part of the husband.

(p) If the husband has commenced a joint action in his own name and in that of his wife, for the purpose of reducing the wife's chose in action into possession, and the wife dies before judgment, the action is at an end, and the unrecovered chose in action vests in the

(n) 32 Hen. 5 c. 37, s. 3. Andrew Ognell's case, 4 Co. 51, a. b.

(o) Huntley v. Griffith, Moore, 432; Golds. 159, 160.

(p) Molony v. Kennedy, 10 Sim. 254. Johnstone v. Lumb, 15 Ib. 308.

But see now the Married Womens' Property Act, 1870.

wife's personal representative; but, if the wife dies after judgment, but before execution, the husband alone is entitled to the benefit of the judgment, and may have execution without a scire facias. (*q*) The receipt by the husband of interest on a promissory note made to the wife before the marriage is no evidence of a reduction of the note into the possession of the husband during the coverture. (*r*)

1391. *Rights of the surviving husband as administrator to the wife.*—The surviving husband is entitled jure mariti to demand administration of his wife's personal estate, and may recover the same for his own use and benefit. (*s*) If the surviving husband should die before he has obtained a grant of administration, or before all the wife's choses in action have been reduced into possession, administration de bonis non of the wife must be taken out; (*t*) and this is granted the next of kin of the husband, as the party by law entitled to the property; (*u*) and, if administration de bonis non of the wife is obtained by any third person, he is a trustee for the representative of the husband. (*x*) Chattels real and personalty possessed by the wife in autre droit, as executrix or administratrix, do not, as previously mentioned, vest in the husband by survivorship, but belong to the administrator de bonis non of the testator or intestate. (*y*)

1392. *Liabilities of the surviving husband.*—Where the husband takes the benefit of contracts

(*q*) *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243. *Gabriel Miles's case*, 1 Mod. 179.

(*r*) *Hart v. Stephens*, 6 Q. B. 937.

(*s*) 29 Car. 2, c. 3, s. 25. *Humphrey v. Bullen*, 1 Atk. 459.

(*t*) *Betts v. Kimpton*, 2 B. & Ad.

273. *Fleet v. Perrins*, L. R., 4 Q. B. 500; 38 L. J., Q. B. 257.

(*u*) *Fielder v. Hanger*, 3 Hag. 769. *In re Pountney*, 4 Ib. 789.

(*x*) *Squib v. Wyn*, 1 P. W. 378.

(*y*) *Williams's EXECUTORS*, 319, ed.

1841.

annexed to the wife's freehold and leasehold estates he is charged with the burden of performance of them. He is liable also for the expenses of his wife's funeral to any stranger who may undertake the duty of burying her, in default of the performance of that duty by the husband himself. (2)

1393. *Of the wife's rights by survivorship.*—The surviving wife is absolutely entitled to all her estates of freehold and inheritance, and to all chattels, real and terms of years in land held by the husband during the coverture in her right, and remaining undisposed of at the time of his death. (a) If, during the coverture, the husband alone has granted an underlease out of the wife's term of years, reserving rent to himself, this amounts to a disposition pro tanto of the term, the rent becomes the sole and absolute property of the husband, and his personal representative is entitled to it at his death, although the reversion for the residue of the term remains vested in the wife; but, if the wife be made a party to the underlease, and the rent be reserved to herself and husband jointly, then she is entitled by survivorship to the rent, and to all arrears remaining due at the husband's death. (b) So, also, if a lease be made by husband and wife of her freehold estate, but not acknowledged by the wife, under the 3 & 4 Wm. 4, c. 74, s. 79, and the husband die during the term, and the wife do no act to disaffirm the tenancy, and also die during the term, in the absence of any proof that it was contemplated when the deed was executed that the acknowledgment of the wife should be taken, the lease will be valid up to the time of her

(2) *Ambrose v. Kerrison*, 20 L. J., C. 9. 135.

(b) *Blaxton v. Heath*, Pop. 145.
Drew v. Baily, 3 Keb. 298, 300.

(a) Co. Litt. 351, a; 351, b.

death, and an action may be maintained by her representatives on the covenants in the lease in respect of breaches that may have occurred during her life and after her husband's death. (c) The surviving wife is also entitled to all the fruits of her freehold estate "fallen during coverture," to all arrears of rent reserved on leases made by her for life or years before the marriage, and to all rents, service, charge, or seck of which she was seized *dum sola*, or of which the husband was seized in her right, or of which she and her husband were seized jointly, during the coverture; and she may, after the death of her husband, maintain an action in her own right to recover them. But, if the money has been actually received by a person appointed by the husband for that purpose during the coverture, it becomes the absolute property of the husband, being money had and received to his use; and his personal representative, therefore, and not the wife, is then the party entitled to an action for its recovery. (d) If the money is received on the express understanding that it is to be held for the husband and wife jointly, part of it being for the separate use of the wife, there is no reduction into possession on the part of the husband; and, if he dies while the money is in the hands of the person so receiving it, it will belong to the wife. (e) Where a man covenanted to pay a woman an annuity for her separate use free from anticipation, and afterwards married her, it was held that the annuity was only suspended by the marriage, and that the widow was entitled to recover arrears accrued subsequent to the death of the husband. (f)

(c) *Toler v. Slater*, L. R., 3 Q. B. 42; 37 L. J., Q. B. 33.

(d) 1 Roll. Abr. D. 350. Co. Litt. 351, a. *Temple v. Temple*, Cro. Eliz. 791.

(e) *Jones v. Cuthbertson*, L. R., 7 Q. B. 215; 41 L. J., Q. B. 145.

(f) *Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 83; 37 L. J. P. C. 44.

1394. *Unrecovered choses in action.*—The wife is also entitled by survivorship to property purchased by her and her husband in their joint names; and, if the purchase-money has not all been paid in the lifetime of the husband, she is entitled, after his decease, to have the balance discharged out of his general assets. (*g*) She is also entitled to the benefit of all contracts under seal entered into during the coverture with herself alone, or with her husband and herself jointly; (*h*) but she may waive her right to the instrument; and it then becomes the obligation of the baron alone. And if, after the death of her husband, she sues upon the deed as his administratrix, and not in her own right, this appears to be a sufficient election and waiver of the instrument on her part; and on her death, therefore, before judgment, the administrator de bonis non of the husband, and not her own personal representative, must bring an action for the money. (*i*) To a debt due on a joint judgment, recovered by herself and husband during the coverture, the wife is also entitled by survivorship. (*k*) The surviving wife is entitled also to all railway shares and stock standing in her name in the books of a railway company, (*l*) and to all promissory notes and bills of exchange made payable to her during the coverture, and to all express simple contracts, where the promise has been made to herself during the marriage, and the consideration to support it has moved from her. (*m*) Where a feme covert administratrix received a sum of money in that character, and lent the same to her hus-

(*g*) *Drew v. Martin*, 2 H. & M. 130 ;
33 L. J., Ch. 367.

(*h*) 1 Roll. Abr. 349 (B). *Coppin*
v. —, 2 P. W. 496.

(*i*) *Norton v. Glover*, Noy's Rep.
149.

(*k*) Com. Dig. Bar. et Feme, F. 1.
Oglander v. Baston, 1 Vern. 96.

(*l*) *Dalton v. Mid. Rail. Co.*, 22 L.
J., C. P. 177 ; 12 C. B. 458.

(*m*) *Nash v. Nash*, 2 Mad. 133.
Gaters v. Madeley, 6 M. & W. 423.

band, taking in return for it the joint and several promissory notes of her husband and two other persons, payable to her with interest, and the husband died, it was held that the note was a chose in action surviving to the wife. (*n*) As regards a simple contract, however, made with the wife alone, or with the husband and wife jointly, during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If, in his lifetime, he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife can not consequently, in this case, take it by survivorship. (*o*) If he joins his wife as a party suing on the contract, and dies, she may, by entering a suggestion of the death upon the record, prosecute the suit to judgment for her own sole use; and, even if judgment has been signed in the action so commenced prior to the husband's death, but no execution levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use. (*p*)

1395. *Gifts to the wife, during marriage*, of diamonds, furniture, plate, &c., enure to the separate use of the wife; and she is entitled to them in her own right, the husband being considered, in respect of his legal interest, a trustee for the wife.

1396. *Paraphernalia*.—Gifts of personal ornaments by the husband to the wife are considered paraphernalia, and belong to the wife on the death of the husband, unless the assets of the husband are insufficient for the liquidation of his debts, in which case they

(*n*) *Richards v. Richards*, 2 B. & Ad. 447.

(*o*) *Scarpellini v. Atcheson*, 7 Q. B. 864.

(*p*) *Sherrington v. Yates*, 12 M. & W. 865. *Bond v. Simmons*, 3 Atk

21. *Nanney v. Martin*, 1 Ch. C. 27.

may be seized and sold by his creditors. The husband can not devise his wife's paraphernalia; but he may pledge them; and they are answerable for his debts, if his assets are insufficient for the payment of them. Old family jewels coming from the husband's family are not paraphernalia, though worn by the wife during marriage. (q)

1397. *Liabilities of the surviving wife.*—If a husband, separated from his wife, has not been heard of for seven years, he is presumed to be dead, and the wife becomes, from that time, to all intents and purposes, a single woman, and is responsible for the fulfillment of all contracts she may afterwards enter into.

1398. *When the wife is entitled to an indemnity out of the estate of her deceased husband.*—If the wife has executed a bond, or accepted a bill of exchange or given her promissory note, or any other contract or security, to enable the husband to raise money thereon for his own purposes, or if she has lent her husband the savings from her separate property, she is entitled, on the death of her husband, to be recouped out of her husband's estate. (r) If, during the marriage, the husband has pledged any of the wife's paraphernalia, the wife is entitled to have them redeemed for her use out of his personal estate. (s)

(q) *Graham v. Londonderry*, 3 Atk. 393. *Jervoise v. Jervoise*, 17 Beav. 571. *Northey v. Northey*, 2 Atk. 78. (r) *Hudson v. Carmichael*, 23 L. J., Ch. 893. (s) *Graham v. Londonderry*, *supra*.

CHAPTER VIII.

IMPLIED CONTRACTS.

SECTION I.

GENERAL PRINCIPLES.

1399. *Implied contracts.*—We have already seen (*a*) that the law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and that such contracts are implied sometimes in furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. Thus a promise to pay for services rendered or for goods received or money obtained, will be implied against a wrong-doer who never intended to pay, or intended deceptively to avoid payment. (*b*) Such is the case where goods have been obtained by an act of trespass, and have been sold, and the proceeds of the sale received by the trespasser, (*c*) and where minerals or the produce of the soil have been wrongfully severed, and carried away and converted into money by the wrong-doer. (*d*)

(*a*) *Ante*, Vol I, p. 52, § 30.

(*b*) *Foster v. Stewart*, 3 M. & S. 191.
Lightly v. Clouston, 1 Taunt. 113.
ERLE, C. J., Rumsey v. N. E. Ry. Co.,
 32 L. J., C. P. 247. *Clark v. Gilbert*,
 2 Sc. 534.

(*c*) *Rodgers v. Maw, Neat v Harding, post.* *Lindon v. Hooper*, 1 Cowp. 414.

(*d*) *Powell v. Rees*, 7 Ad. & E. 428.
Bailey v. Birtles, T. Raym. 71. *Perkinson v. Gilford*, Cro. Car. 539.

1400. *Of implied covenants*—Although the words of a contract under seal do not in themselves import any express covenant, yet the law, in order to promote good faith and make men act up to the spirit as well as to the letter of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations, which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the deed itself. Thus, where it was agreed by deed between A and B that B should pay a sum of money for A's lands by a particular day, it was held that there was, by implication, a covenant to execute a conveyance of the land by the day named. (e) And where, on the sale and transfer of the goodwill of a business, it was stipulated that the transferee should pay to the transferor one-fourth part of the earnings of the business for four successive years, it was held that the law would imply a covenant from the transferee to continue the business for four years, and endeavor to make it productive, if there was reasonable prospect of success. (f) By the common law, if one man granted to another any estate or interest or incorporeal right, the law implied a covenant from the grantor that he would do nothing to annul or avoid such grant; if he granted a watercourse, a right of way, or estovers, there resulted from such grant, by inference of law, a covenant for the quiet enjoyment of the thing granted; and, if the grantor stopped up the watercourse or the road, or cut down the wood out of which the estovers were to be taken, the grantee was entitled to an action of covenant against him for the misfeas-

(e) *Pordage v. Cole*, 1 Saund. 319. N. S., 654; 32 L. J., C. P. 254.

(f) *McIntyre v. Belcher*, 14 C. B.,

ance. (*g*) By the 7 & 8 Vict. c. 76, s. 6, however, which extends to all estates, rights, and interests created between the 1st of January and the 1st of October, 1845, it is enacted that the word "grant" in a deed shall not have the effect of creating any covenant by implication, except in cases where, by any act of parliament, it is or shall be declared that the word "grant" shall have such effect. And by the 8 & 9 Vict. c. 106, s. 4, it is enacted that the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant.

It was formerly held, in the case of leases under seal, that the law would imply from the word "demise," or any equivalent words in the contract constituting and creating the lease, a covenant on the part of the lessor that he had a right to make the lease; (*h*) but it has been determined that there is no implied covenant on the part of the lessor that he has "good title to demise," but only a covenant that he will put the lessee into possession of the thing demised, (*i*) and that the lessee "shall quietly enjoy" during the term, (*k*) or, in the case of a tenancy from year to year, during the continuance of the lessor's interest. (*l*) From the words "yielding" or "paying," or any equivalent words amounting to a reservation of rent, there is an implied covenant on the part of the lessee

(*g*) 1 Saund. 321. Bac. Abr. Covenant, B.

(*h*) Holder v. Taylor, Hob. 12. Shep. Touch. 165, 167. Noke's case, 4 Co. Rep. 80, b. 9 Ves. 330. Line v. Stephenson, 7 Sc. 69.

(*i*) Coe v. Clay, 5 Bing. 440; 3

Moo & P. 57. Messent v. Reynolds, 8 C. P. 201.

(*k*) Bandy v. Cartwright, 8 Exch. 913. Giles v. Hooper, Carth. 135. Williams v. Burrell, 1 C. B. 428.

(*l*) Penfold v. Abbott, 32 L. J., Q.

B. 67.

to pay the rent so reserved, although the words do not in themselves import any express covenant. In all assignments of leases and existing interests there is an implied covenant on the part of the assignor that he has himself done nothing, and will do nothing, to prejudice or defeat the estate, title, or interest that he professes to assign. Where the proprietor of a medicine, and a recipe for making the same, assigned the medicine and recipe, and all his "right, title, interest, claim, or demand to the same medicine, &c.," to a purchaser, it was held that the law would imply from the transfer and assignment a covenant from the vendor that he would not himself prepare and vend the medicine so assigned, or engage with others so doing. (*m*) And, where a man by deed "bargained, sold, assigned, and transferred" a sum of money due to him from a third person, it was held that the law would imply, from the words of transfer and assignment, a covenant from his assignor to do no act to prevent the assignee from obtaining possession of the sum so assigned. (*n*) It has been said, however, that it does not follow "that because parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants." (*o*)

The liability of a shareholder of a joint-stock company, registered under the Act of 1862, to contribute to the assets of the company, is in the nature of a specialty debt, (*p*) and the case is the same where the

(*m*) Seddon v. Senate, 13 East, 63.

(*n*) Derring v. Farrington, 3 Keb. 304; Freem. 368; 1 Mod. 113.

(*o*) Aspdin v. Austin, 5 Q. B. 683, 684. But see Emmens v. Elderton, 4 H. L. Cas. 624; 13 C. B. 495; and

Whittle v. Frankland, 2 B. & S. 49; 31 L. J., M. C. 81.

(*p*) Companies' Act of 1862, s. 75. Buck v. Robson, L. R., 10 Eq. 629; 39 L. J., Ch. 821.

company is not registered under that act, but is wound up under it. (*q*)

1401. *Implied promises.*—An agreement for a lease to commence from a particular day does not amount to an agreement to give the intended lessee possession on that day ; (*r*) but, as we have seen, if there be a lease or present demise, there is an implied promise or covenant from the lessor to put the lessee into possession of the thing demised, and to secure him the free use, possession, and enjoyment of it for the term for which he has agreed to let it, as against all persons claiming through the lessor or by title paramount. (*s*) If apartments in the interior of a house are demised by parol, the law implies a promise from the lessor to allow the tenant the use of the door-bell and knocker, the benefit of the skylight on the staircase, the use of the water-closet, and the enjoyment of all such rights as are naturally incident to the subject-matter of the contract, and necessary for the reasonable and comfortable enjoyment of it. (*t*) In the case of an executory agreement for the sale and purchase of a lease the law implies a promise from the vendor to establish and make good his title to the lease which he proposes to sell and assign. (*u*) And, when the purchaser has accepted the assignment, the law implies a promise from him to the assignor to pay the rent reserved in such lease, and perform the covenants therein contained. (*x*)

The law also implies, from all persons who undertake any duty, charge, office, employment, or trust, a

(*q*) *In re Muggeridge*, L. R., 10 Eq. P. 29.
 443 ; 39 L. J., Ch. 620. (*u*) *Souter v. Drake*, 5 B. & Ad. 992 ;
 (*r*) *Drury v. Macnamara*, 25 L. J., 3 N. & M. 40. *Hall v. Betty*, 5 Sc.
 Q. B. 5. N. R. 508.
 (*s*) *Ante*. (*x*) *Burnett v. Lynch*, 8 D. & R.
 (*t*) *Underwood v. Burrows*, 7 C. & 376, 383 ; 5 B. & C. 602.

promise to act with integrity and diligence and proper and reasonable care in the execution of such duty, trust, or employment, and according to orders given and assented to. (*y*) A banker who has in his hands sufficient funds of a customer impliedly undertakes to pay a check drawn by the latter, if the check be presented within banking hours; (*z*) and a man who undertakes the duty and office of an executor, and has assets sufficient for the purpose, impliedly promises to pay for a funeral suitable to the station in life of his testator, furnished and provided by a third person in the absence of the executor, and without his knowledge and concurrence; and the law implies a request from the executor to the stranger who has undertaken the necessary duty, to do what he has done, although in point of fact he gave no orders and made no promise. (*a*) If a man voluntarily takes charge of the goods and chattels of another, the law implies a promise from him to take reasonable and proper care of them. (*b*) The law also implies a promise from a common innkeeper to secure his guest's goods in his inn, and to take all reasonable and proper care of horses and cattle placed in his stables; (*c*) from a common carrier, or cab-proprietor, to be answerable for the goods he carries; (*d*) from a ferry-man, safely to transport things intrusted to him across a river, and deliver them on the opposite bank; from a common farrier, that he will shoe a horse without laming him; from a trainer of horses, that he will exercise reasonable skill and management in the riding of horses intrusted to him; from any artificer

(*y*) *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131. *Tugwell v. Heyman*, 3 Camp. 298.

(*b*) *Southcote's case*, 4 Rep. 83, b

(*z*) *Marzetti v. Williams*, 1 B. & Ad. 84.

415.

(*c*) *Ante*.

(*a*) *Rogers v. Price*, 3 Y. & J. 28.

(*d*) *Ante*.

and handicraftsman, that he will exercise his art rightfully, truly, and skillfully, as he ought; and from brokers, agents, solicitors, surgeons, and other professional men, that they will severally, in their respective callings, exercise competent skill and proper care in the service they undertake to perform, in which, if they fail, an action lies to recover damages for the breach of their implied promise. (*e*)

When one man engages with another to supply him with a particular thing, to be applied to a certain use, in consideration of a pecuniary payment, he enters into an implied contract that the thing shall be reasonably fit for the purpose for which it is to be used, and shall not contain any defect unfitting it for such purpose which might have been discovered by the exercise of reasonable skill and diligence, or by ordinary inquiry and examination. (*f*)

If a husband wrongfully discards his wife, any person may furnish her with raiment, food, lodging, and the necessaries of life; and the law will imply a promise from the husband to pay for the things so supplied, in the same way as if they had been supplied to himself at his express request. (*g*) As a man is bound to support his wife whilst living, as being part and parcel of himself, so is he bound by law to bury her when dead; and, if the husband has abandoned the wife, and lives in a distant land, and is unable, or being able, is unwilling, and neglects to bury her, any

(*e*) *Norris v. Staps*, Hob. 211. 1 Roll. Abr. 91, pl. 15. *Best v. Yates*, 1 Vent. 268.

(*f*) See, as to a building to view a public exhibition, *Francis v. Cockrell*, L. R., 5 Q. B. 501; 39 L. J., Q. B. 291; a railway carriage, *Redhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412;

Ib., 4 Q. B. 379; 38 L. J., Q. B. 169; as to a bridge, *Grote v. Chester and Holyhead Ry. Co.*, 2 Ex. 251; as to a staircase in a public exhibition, *Brazier v. Polytechnic Institution*, 1 F. & F. 507.

(*g*) *Ante*.

stranger may undertake the duty and defray the expenses of a funeral suitable to her rank or fortune; and the law implies a request on the part of the husband to the stranger so to do, as well as a promise to repay the money so laid out, upon which implied promise an action is maintainable against the husband, though the burial was, in point of fact, undertaken, and the money paid, without his knowledge or consent. (*h*) So that in this, as in other instances of implied contracts and promises, the ancient legal maxim is well supported, in *fictione juris subistit æquitas*.

When a servant binds himself to work for some certain period, and the master agrees to pay wages in proportion to the work done, there is an implied obligation on the part of the master to provide work. And, if a person contracts to pay a salary for services to be rendered for a certain term, there is an implied contract on his part to permit those services to be performed. (*i*) Generally speaking, every workman who devotes his labor, his talents, and his time to the service of an employer is entitled to a recompense, and the law implies a promise from the employer, in case nothing has been said or stipulated concerning payment, to pay a reasonable compensation for the services rendered; and the right of action upon such implied promise or undertaking arises as soon as the work has been completed, and the employer is enabled to avail himself of the benefit of it. (*k*) But the law raises no implied promise in respect of services

(*h*) *Jenkins v. Tucker*, 1 H. Bl. 94.
Chapple v. Cooper, 13 M. & W. 259.
Bradshaw v. Beard, 12 C. B., N. S.,
 344; 31 L. J., C. P. 273.

(*i*) *Reg. v. Welch*, 2 Ell. & Bl. 357.
Emmens v. Elderton, 4 H. L. Cas.
 624.

(*k*) *Hughes v. Lenny*, 5 M. & W.
 183.

rendered against the will of the recipient, (*l*) or in respect of mere gratuitous services, such as voluntary assistance in saving property from fire, or securing property found afloat, or beasts found astray, or voluntary and unsolicited supplies of food and lodging, or voluntary services in the management of the affairs of another; for that which is offered and accepted as a gratuity can not afterwards be converted into a debt. (*m*) The law raises no implied promise of remuneration in favor of a person who professes to render services of a purely honorary character. (*n*)

Whether any contract is made, or on what terms it is made, must depend on the circumstances of each case, and upon custom and usage. (*o*) If a fund is to be collected, and a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand, there is no contract. If he does work on the order of another under such circumstances that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person. (*p*) If a man wrongfully decoys away my servant or apprentice against my will, and acquires and makes use of his labor and services, the law will imply a promise from the wrong-doer to render to me a fair equivalent in respect thereof. (*q*) So, if a man takes luggage by an excursion train, knowing that the company do not carry luggage gratuitously for per-

(*l*) *Stokes v. Lewis*, 1 T. R. 20.
British Empire Shipping Company v.
Somes, E. B. & E. 353; 30 L. J., Q.
 B. 229.

(*m*) *Nicholson v. Chapman*, 2 H.
 Bl. 254; 1 Esp. 86; *Peake's Ad. C.*
 226; 1 C. & P. 434. *Taylor v. Brewer*,
 1 M. & S. 290

(*n*) *Ante*.

(*o*) *Rigley v. Dakin*, 2 Y. & J. 87.

(*p*) *Higgins v. Hopkins*, 3 Exch.
 166.

(*q*) *Lightly v. Clouston*, 1 Taunt.
 112. *Foster v. Stewart*, 3 M. & S.
 195

sons traveling by such train, a contract to pay for its carriage may be implied. (*r*)

1402. *Part execution of a special contract.*—

Where a workman had been induced to enter into a special contract to remove a quantity of rubbish by a fraudulent representation made by the employer, it was held that he might repudiate the contract as soon as he discovered the fraud, and sue his employer for compensation for his lost time and labor; (*s*) and, when a special contract for work and services has been abandoned and put an end to, and the employer has derived some benefit from work done under it, he may be made liable, upon an implied promise, to make a reasonable remuneration in respect thereof. (*t*)

1403. *Implied contracts for sale.*—Whenever a purchaser retains goods after a special contract for the sale of them has gone off, or has not been exactly performed by the vendor, the vendor may recover the value of the goods upon a new contract and promise which the law then implies from the retention of the goods. (*u*) If goods have been obtained by fraud and deceit, the party defrauded of his goods may, if he thinks fit, waive the tort, and sue upon an implied contract, treating the wrong-doer as a purchaser of the goods. Where a father falsely pretended to retire from business in favor of an infant son whom he introduced as his successor, stating that he should keep a watchful eye over him, and upon this representation the plaintiffs supplied the son with goods to

(*r*) *Rumsey v. North Eastern Railway Company*, 14 C. B., N. S., 641; 32 L. J., C. P. 244.

(*s*) *Selway v. Fogg*, 5 M. & W. 86.

(*t*) *Burn v. Miller*, 4 Taunt. 745.
Hopkins v. Richardson, 14 L. J., Q. B. 80. *Inchbald v. Western Neil-*

gherry Tea Company, 17 C. B., N. S., 733; 34 L. J., C. P. 15. *Bartholomew v. Markwick*, 15 C. B., N. S., 711; 33 L. J., C. P. 145.

(*u*) *Oxendale v. Wetherell*, 9 B. & C. 383. *Mavor v. Pyne*, 11 Moore, 2

the amount of £800, and, the son refusing to pay for these goods, and being exonerated from liability by reason of his minority, the plaintiffs brought their action against the father, it was held that, if the father's statement to the plaintiffs was false, and he continued, notwithstanding his pretended retirement, to have a secret interest in the concern, he was liable upon an implied promise to pay to the plaintiffs the price of the goods, as the real buyer and principal in the transaction. (x) And, where the defendant knowingly induced the plaintiff to sell goods to an insolvent, which goods were immediately afterwards made over to the defendant himself, the court held that the law would imply a contract from the defendant to pay for the goods as the real purchaser, the insolvent appearing to have been the mere creature and agent of the defendant, and a mere man of straw in the transaction, made use of by the defendant to enable him to perpetrate a fraud upon the plaintiff. (y)

1404. *Foreign judgments.*—The law raises an implied contract to pay a sum of money adjudged to be due from one man to another by the sentence of a foreign or colonial court, (z) provided the judgment is final, and a fixed and ascertained sum of money is thereby adjudged to be paid. (a) But the pendency of an appeal is no bar to the action, although it may afford ground for an application to stay proceedings. (b) Nor is it any answer to such an action that the judgment is erroneous; (c) but it may be defeated by

(x) *Biddle v. Levy*, 1 Stark. 20.

(y) *Hill v. Perrott*, 3 Taunt. 274.

Abbotts v. Barry, 5 Moore, 98.

(z) *PARKE, B., Williams v. Jones*, 13 M. & W. 632. *Philpot v. Adams*, 7 H. & N. 888; 31 L. J., Ex. 421.

(a) *Sadler v. Robins*, 1 Campb. 253.

(b) *Scott v. Pilkington*, 2 B. & S. 11

31 L. J., Q. B. 81.

(c) *De Cosse Brissac v. Rathbone*,

6 H. & N. 301; 30 L. J., Ex. 238.

Godard v. Gray, L. R., 6 Q. B. 139;

40 L. J., Q. B. 62. *Castrigne v. Imrie*,

L. R., 4 H. L. 414; 39 L. J., C. P

350.

showing that the court had no jurisdiction, (*d*) as, for instance, that the judgment was pronounced against a person behind his back, who was not subject to its jurisdiction, (*e*) or that the judgment was obtained by fraud, (*f*) or perhaps that it was given against good faith and natural justice. (*g*)

SECTION II.

OF IMPLIED PROMISES IN RESPECT OF MONEY PAID FOR ANOTHER.

1405. *Of the implied promise in respect of money paid for another.*—Whenever one man has expended and laid out money for the use of another by his authority or at his request, the law implies, from the person on whose account and for whose use the money has been expended, a promise of repayment, in the absence of circumstances showing that the money was advanced as a gift. (*h*) Where the defendant asked the plaintiff to accompany him to a harness-maker, to assist him in procuring some harness, and the plaintiff, in the defendant's presence, assured the harness-maker that, if the defendant did not pay, he, the plaintiff, would, and the defendant made default, and the plaintiff paid the money, it was held that the law would imply a promise from the defendant to repay the money, as being "money paid by the plaintiff for the use of the defendant at

(*d*) Vanquelin v. Bonard, 33 L. J., C. P. 78.

(*e*) Buchanan v. Rucker, 9 East, 192. Schibsbys v. Westenholz, L. R., 6 Q. B. 155; 40 L. J., Q. B. 73.

(*f*) Bowles v. Orr, 1 Y. & C., Ex. 464.

(*g*) Simpson v. Fogo, 1 H. & M. 195; 32 L. J., Ch. 249; 2 Smith, L. C. 6th ed., p. 726.

(*h*) Brittain v. Lloyd, 14 M. & W. 762; 15 L. J., Ex. 43. Barber v. Butcher, 15 L. J., Q. B. 289; 8 Q. B. 863.

his request." (*i*) If a person who owes a debt to A., by any contrivance causes B. to pay it, an action will lie to recover back the amount, and the machinery by which the mischief was brought about is utterly immaterial. Therefore, where one of two partners made a note in the partnership name, and paid it away in discharge of his own private debt, and the co-partner was compelled to pay the amount of the note, it was held that he was entitled to recover the money from his colleague, the maker of the note, as money paid at his request. (*j*) When several persons together consent to share a common responsibility, there is, in the absence of an express agreement to the contrary, an understood authority from all to any one and to each of them to discharge the common burden and liability; and, if any one of them pays the whole amount, or more than his own share and proportion, the money paid by him over and above his own proportion is money paid for the use of the others at their request. (*k*) And the same rule prevails with regard to all joint contractors, not being partners, who have undertaken or have been made subject to a joint liability, and one of whom has paid the whole or more than his own share and proportion of the common burden, and has thus relieved his co-contractors from their liability, either wholly or in part. (*l*) If a party of friends, for example, meet to dine at a tavern, and give a joint order for dinner, and after dinner all but the plaintiff depart without paying, and the plaintiff pays for all, he may maintain an action against the others upon an implied promise to pay

(*i*) *Alexander v. Vane*, 1 M. & W. 511. 15, b.

(*j*) *Cross v. Cheshire*, 21 L. J., Ex. 3; 7 Exch. 43. *Driver v. Burton*, 21 L. J. Q. B. 157.

(*k*) *Harbert's case*, 3 Co. 13, a,

(*l*) *Buknell v. Minot*, 4 Moore, 340. *Prior v. Hembrow*, 8 M. & W. 873. *Reynolds v. Wheeler*, 10 C. B., N S.

561; 30 L. J., C. P. 350.

their several proportions of the joint liability; (*m*) and the same rule prevails, and the same implied promise arises, where four persons jointly retain a solicitor to defend them against a civil or a criminal charge, or to conduct an action or a prosecution on their behalf, and the plaintiff, one of the four, has paid the solicitor's bill; (*n*) or where two parties agree to employ an arbitrator, and one of them pays money to take up the award. (*o*) But there is no contribution between persons who have engaged to do an unlawful act, and are therefore joint tort-feasors; (*p*) nor where money has been paid by one of several joint contractors negligently, and not in discharge of a joint liability; (*q*) and it has been held that no such promise is implied, and no such liability arises, as between under-lessees of separate portions of premises holden under one original lease at an entire rent, where one only has been distrained upon or compelled under a threat of distress to pay the whole of such rent. (*r*)

1406. Money paid by mistake.—Where money has been paid by A to B's bankers at the instance and request of B, under forgetfulness or a mistake of facts, A is entitled to recover back the money. (*s*)

1407. Implied request to pay.—The action for money paid is founded on the notion that the money was paid by the plaintiff for the use of the defendant at his request, and that the defendant, in consideration thereof, promised the plaintiff to pay him the amount

(*m*) *Hussey v. Crickett*, 3 Campb. 173.

(*n*) *Edger v. Knapp*, 6 Sc. N. R. 707, 713. *Holmes v. Williamson*, 6 M. & S. 158.

(*o*) *Marsack v. Webber*, 6 H. & N. 1, 6.

(*p*) *Farebrother v. Ansley*, 1 Campb.

343. *Wilson v. Milner*, 2 Campb. 451.

(*q*) *Hunter v. Hunt*, 1 C. B. 300.

(*r*) *McIlreath v. Margetson*, 4 Doug. 278.

(*s*) *Mills v. Aldenbury*, 3 Exch. 530. And see *post*.

so expended ; for the law raises no implied promise in respect of a voluntary, unauthorized payment, which the party was not called upon or required to make on behalf of another. (*t*) But the law will, under certain circumstances; imply the request as well as the promise, and so support a righteous and meritorious claim. If, for example, the defendant, by neglecting to pay money which he was by law bound to pay, has cast the duty and obligation upon the plaintiff, and the latter has paid the money, not voluntarily and officiously, but by compulsion of law, the compulsion so brought upon the plaintiff by the defendant is equivalent to an express request ; and proof of such compulsion will support the necessary allegation in the declaration, that the money was paid by the plaintiff for the use of the defendant at his request.

It has been held, for example, that a compulsion indirectly emanating from the defendant amounted to a constructive request in the following cases :—where the carriage of the plaintiff was intrusted to the defendant, a coachmaker, to be repaired, and, whilst standing on the defendant's premises, was distrained by the landlord for rent due from the defendant, and the plaintiff, in order to redeem and get back his carriage was obliged to pay the rent ; (*u*)—where a sub-tenant paid, under a threat of distress, a ground rent to the original lessor, which ought to have been paid by his own immediate landlord ; (*w*) also, where a tenant was compelled to pay income-tax and other outgoings and burdens on the land, which ought by law to have been paid by the lessor ; (*x*)—where an executor paid

(*t*) Lord KENYON, 8 T. R. 310, 311, 512.

613. Stokes v. Lewis, 1 T. R. 21.

(*x*) Baker v. Greenhill, 3 Q. B. 148.

(*u*) Exall v. Partridge, 8 T. R. 308.

Graham v. Tate, 1 M. & S. 611.

Rodgers v. Maw, 15 M & W 448.

Earle v. Maugham, 14 C. B., N. S.

(*w*) Sapsford v. Fletcher, 4. T. R. 626.

a legacy in full, inadvertently omitting to deduct the legacy duty, which he is required by act of parliament to deduct and pay to the crown, and was afterwards compelled to pay such duty, the statute declaring that, in case the executor omits to deduct the duty, such duty shall become a debt due to the crown from both the executor and the legatee ; (*y*)—where the defendant omitted to furnish money for the payment of shares which he had directed the plaintiff to buy for him, and the plaintiff was obliged to re-sell the shares at a loss, and the action was brought for the money lost ; (*z*)—where the plaintiff had been obliged by the custom of the stock-exchange to pay calls on shares bought by him for the defendant, which calls the defendant was bound to pay ; (*a*)—where the plaintiff, a carrier, by mistake, delivered to the defendant goods consigned to a third party, and the defendant appropriated the goods to his own use, and the carrier was obliged to pay the value of them to the consignor ; (*b*)—where the defendant obtained possession of goods intrusted to the plaintiff to be sold at a fixed price, upon the terms that he should either re-deliver them to the plaintiff, or pay the price within a limited period, and the defendant refused to do either, and the plaintiff, being threatened with an action, paid the price to the owner, and the action was brought to recover the amount so paid ; (*c*)—where the plaintiff had entered into a deed of composition with his creditors upon the terms that they should receive ten shillings in the pound, and the defendant refused to sign the deed without receiving security for

(*y*) *Hales v. Freeman*, 4 Moore, 21. *Foster v. Ley*, 2 Sc. 438. *Bate v. Payne*, 13 Q. B. 900.

(*z*) *Pollock v. Stables*, 12 Q. B. 765. *Smith v. Lindo*, 5 C. B., N. S., 587.

(*a*) *Bayley v. Wilkins*, 7 C. B. 886.

(*b*) *Brown v. Hodgson*, 4 Taunt. 189.

(*c*) *Longchamp v. Kenny*, 1 Doug. 137.

the payment of the residue of the debt, and the plaintiff privately gave the defendant his promissory note for the remainder of the debt, upon the terms that he should keep such note in his own hands, and the defendant, in breach of his agreement to that effect, negotiated the note, and the plaintiff was compelled to pay the amount thereof to the indorsee; (*d*)—where the plaintiff agreed to grant the defendant a lease, and the lease was prepared by the plaintiff's solicitor, and the plaintiff was obliged to pay for the lease by reason of the defendant's refusal so to do, it being shown that, according to the usual course of business in such cases, the lessor's solicitor prepared the lease, and the lessee paid the expense of it. (*e*) But the law raises no such implied promise from a mortgagor in favor of the mortgagee's attorney, where the negotiation for a mortgage goes off through the default of the mortgagor. (*f*) And, where A, under a bill of sale, seized goods on B's premises, and, with his knowledge, but without any express request, allowed them to remain there until rent became due, and, the landlord having distrained them, A paid the rent and expenses, it was held that this was not a compulsory payment by A of a debt of B for his benefit or at his implied request. (*g*)

The law also raises an implied promise in respect of money paid by the plaintiff for the use of the defendant in the following cases: where an auctioneer has paid the auction duty on a sale of lands which

(*d*) *Horton v. Riley*, 11 M. & W. 492. *Bradshaw v. Bradshaw*, 9 M. & W. 29. *Smith v. Cuff*, 6 M. & S. 160. *Atkinson v. Denby*, 30 L. J., Ex. 361; 31 L. J., Ex. 362.

(*e*) *Grissell v. Robinson*, 3 Sc. 329; 3 Bing., N. C. 10. See, as to the cost

of preparing a marriage settlement, *Helps v. Clayton*, 17 C. B., N. S., 553.

(*f*) *Wilkinson v. Grant*, 25 L. J., C. P. 233.

(*g*) *England v. Marsden*, L. R., 1 C. P. 529; 35 L. J., C P. 259.

were bought in by the vendor, and the commissioners of excise refuse to remit the duty ; (*h*) where a broker has paid money for his principal in the usual and known course of business, although without a direct request from the principal ; (*i*) where the plaintiff, at the request of the defendant, has become security for him for the payment of money, and the plaintiff, by reason of the neglect of the defendant to pay at the time appointed, is compelled to pay the debt out of his own pocket ; (*k*) where the plaintiff accepts a bill of exchange drawn on him by the defendant, and the consideration for the acceptance fails, and the plaintiff is obliged to pay the amount of the bill when due ; (*l*) also where the plaintiff has accepted a bill for money lent by the defendant, and has become insolvent, and the defendant has agreed to a composition, and it has become his duty to indemnify the plaintiff from liability on the bill, and he has neglected so to do, and the plaintiff has been compelled to pay the amount ; (*m*) also, where the plaintiff accepts a bill of exchange, or makes or indorses a promissory note for the accommodation of the defendant, and without value or consideration, and the plaintiff is obliged to pay the bill or note when it comes to maturity, by reason of the defendant's neglect to provide the necessary funds for the purpose ; (*n*) also, where the acceptor neglects to pay a bill when due, and the plaintiff, as indorser, is compelled

(*h*) *Brittain v. Lloyd*, 14 M. & W. 762 ; 15 L. J., Ex. 43.

(*i*) *Sentence v. Hawley*, 13 C. B., N. S., 458.

(*k*) *Fisher v. Fellows*, 5 Esp. 171. Lord KENYON, 8 T. R. 310. *Lewis v. Campbell*, 8 C. B., 541 ; 19 L. J., C. P. 130.

(*l*) *Hooper v. Treffry*, 1 Exch. 17.

(*m*) *Hawley v. Beverley*, 6 Sc. N. R. 837 ; 6 M. & G. 221.

(*n*) *Bleadon v. Charles*, 5 Moo. & P. 14 ; 7 Bing. 246. *Reynolds v. Doyle*, 2 Sc. N. R. 45. *Driver v. Burton*, 21 L. J. Q. B. 157.

by the holder to pay him. (*o*) It is sufficient if the party paying the money shows that the legal obligation was cast upon him by the default of the defendant, and that the law compelled him to do what he has done; he need not wait for the actual issue of legal process, or abide the result of an action in order to establish the fact of the compulsion. (*p*) But the law raises no implied promise out of a transaction which has been a breach of duty, and will give no assistance towards the recovery of money paid in furtherance of an illegal or immoral purpose, (*q*) or which a party has been compelled to pay in consequence of his own neglect. (*r*) If a tenant, after he has paid the income-tax, omits to deduct it from the rent, he can not recover it from the landlord in an action for money paid. (*s*) It must be shown that money or its equivalent has been actually paid, (*t*) and that the defendant was bound to pay what the plaintiff has been compelled to pay on his behalf. (*u*)

SECTION III.

IMPLIED PROMISES IN RESPECT OF MONEY RECEIVED FOR THE USE OF ANOTHER.

1408. *Implied promises in respect of money received for the use of another.*—If a man, through

(*o*) *Pownal v. Ferrand*, 9 D. & R. 607; 6 B. & C. 439.

(*p*) *Maydew v. Forrester*, 5 Taunt. 615. *Austin v. Ward*, R. & M. 116.

(*q*) *Pitcher v. Bailey*, 8 East, 172. *Betts v. Gibbins*, 2 Ad. & E. 57.

(*r*) *Capp v. Topham*, 6 East, 392. *Pitcher v. Bailey*, 8 East, 171

(*s*) *Cummings v. Bedborough*, 15 M. & W. 438.

(*t*) *Taylor v. Higgins*, 3 East, 169. *Maxwell v. Jameson*, 2 B. & Ald. 51. *Moore v. Pyrke*, 11 East, 52.

(*u*) *Griffenhoofe v. Daubuz*, 25 L. J., Q. B. 237.

some mistake or misapprehension or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, in foro conscientiæ, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner. (*x*)

But it has been held that, if a party makes a voluntary payment in satisfaction and discharge of some disputed claim, with full knowledge of the facts, but under ignorance of the law, and from a mistake and misapprehension of his legal liability, and no fraud, or concealment, or misrepresentation has been resorted to by the other side to induce the payment, the law will not help the party so paying the money to recover it back. (*y*) If an action, for example, has been commenced to enforce a claim put forward by the plaintiff, and the defendant settles the action and pays money in satisfaction and discharge of such claim, and then discovers that the claim was unfounded, and that there was no cause of action, he can not recover back the money on the ground that it was paid by mistake; for there would be no end to litigation if that were to be permitted, and disputed questions and transactions so settled and adjusted were to be opened afresh. (*z*) It is otherwise, however, if the party making the claim knows it to be unfounded, and wrongfully makes use of the process of

(*x*) *Kelly v. Solari*, 9 M. & W. 58.
Lucas v. Worswick, 1 Moo. & Rob.
 293. *Milnes v. Duncan*, 9 D. & F.
 735; 6 B. & C. 677, 678. *Bell v.*
Gardiner, 4 M. & Gr. 17; 4 Sc. N. R.
 621. *Barber v. Brown*, 1 C. B., N. S.,
 121. Code Civ. tit. 4, liv. 3, art. 1376.
 Inst. lib. 3, tit. 28, § vi., vii.

(*y*) *Bilbie v. Lumley*, 2 East, 469.
Brisbane v. Dacres, 5 Taunt. 143.
Higgs v. Scott, 7 C. B. 63. *Platt v.*
Bromage, 24 L. J., Ex. 63.

(*z*) *Marriott v. Hampton*, 7 T. R.
 269. *Goodman v. Sayers*, 2 J. & W.
 263. *Hamlet v. Richardson*, 2 M. &
 & Sc. 811; 9 Bing. 644.

the law for purposes of oppression and extortion. (*a*) But, where the money has actually been paid under compulsory process of law, in consequence of the non-attendance of a particular witness, or the non-production of a particular document, it can not be recovered back; for otherwise the rights of parties would never be settled, and verdicts and judgments might be rendered nugatory. (*b*) "The rule, also, has always been that, if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to have paid, he can not recover back the money, as where a man has paid a debt which was barred by the statute of limitation, or a debt contracted during infancy." (*c*)

It has been held that the law would imply a promise from the defendant to pay to the plaintiff money received under the following circumstances:—where contract was entered into for the sale of merchandise at a price to be calculated according to the weight, and an error took place in the weighing, and the goods were reported to be of greater weight than they really were, and the price was calculated and paid by the plaintiff to the defendant according to such false reckoning, and the action was brought to recover the amount of the overpayment; (*d*) where silver was sold in bars at a price to be calculated according to the number of ounces of pure silver contained in each bar, to be determined by an assay of the metal, and a mistake was made by the assay master, and the plaintiff, in consequence thereof, paid the defendant for a greater quantity of silver than each bar was found subsequently to contain, and the action was brought to

(*a*) *Cadeval, Duke de, v. Collins*, 269. *Wilson v. Ray*, 10 Ad. & E. 88.
 4 Ad. & E. 858; 6 N. & M. 324. (*c*) *Bize v. Dickason*, 1 T. R. 286.

(*b*) *Marriott v. Hampton*, 7 T. R. (*d*) *Cox v. Prentice*, 3 M. & S. 349.

recover the amount of such overpayment; (*e*) where the plaintiff had paid rent to the defendant, and it afterwards appeared that the defendant had no right to receive such rent, and the action was brought to recover it back, the title to the land not coming into question, and not being sought to be tried in such action; (*f*) where money was paid by the plaintiff to the defendant for the purchase of a leasehold estate, and it afterwards appeared that the defendant had no title to the lease. (*g*) It is not necessary, however, that money should have been actually received by the defendant to render him liable in this form of action but the circumstances must be equivalent to a receipt of money. (*h*) If two men reckon together, and money is passed in account, and one overpays the other by mistake or false reckoning, the overpayment may be recovered in an action for money had and received. (*i*) But the law raises no implied promise upon which an action can be maintained in respect of money had and received, from the mere fact of one man's money having come into possession of another. (*k*) "If I apply to a man for payment of a debt, and some third person pays me, he can not recover back the money merely because he has paid it under some misapprehension." (*l*) It is necessary to maintain this action, that a certain amount of money belonging

(*e*) *Cox v. Prentice*, 3 M. & S. 349, 350.

(*f*) *Newsome v. Graham*, 10 B. & C. 234, 236. *Robinson v. Anderton*, 1 Peake, 129. *Moneypenny v. Britstowe*, 2 Russ. & Mylne, 117. The courts will not suffer a title to land to be tried in an action for money had and received. *Marshall v. Hopkins*, 15 East, 313, 314. *Clarance v. Marshall*, 2 C. & M. 495.

(*g*) *Cripps v. Reade*, 6 T. R. 606.

(*h*) *Gingell v. Purkins*, 4 Exch. 726. *Spratt v. Hobhouse*, 4 Bing. 179.

(*i*) *HOLT*, C. J., 2 Ld. Raym. 1217; *Townsend v. Crowdy*, 8 C. B., N. S., 477; 29 L. J., C. P. 305.

(*k*) *Jones v. Carter*, 8 Q. B. 134; 15 L. J., Q. B. 96. *Black v. Siddaway*, Ib. 359. *Robbins v. Fennell*, 11 Q. B. 248. *Foster v. Green*, 7 H. & N. 881; 31 L. J., Ex. 158.

(*l*) *MARTIN*, B., *Aiken v. Short*, 1 H. & N. 215.

to one person should have improperly come into the hands of another, (*m*) and that there should be some privity between them. (*n*)

1409. *When money paid by mistake can not be recovered back.*—If trustees or agents represent that they have funds in their hands belonging to the parties for whom they act, and allow them to draw out the same and spend it as their own, the trustees or agents can not recover back the money. Neither can they retain other moneys in their hands belonging to these same parties by way of indemnity. (*o*) The law raises no implied promise in respect of money had and received, where the rights of the receiver of the money have been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount. (*p*) Nor can money be recovered back which was allowed by mistake on a settlement of accounts, where there were cross demands, and the settlement was made on the basis of adjusting differences and disputes between the parties. (*q*)

1410. *Money improperly received and wrongfully detained.*—If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrong-doer; he has no right to retain it; and the law, therefore, implies a promise

(*m*) *Follett v. Hoppe*, 17 L. J., C. P. 76.

(*n*) *Watson v. Russell*, 5 B. & S. 968; 31 L. J., Q. B. 304; 34 L. J., Q. B. 93.

(*o*) *Skyring v. Greenwood*, 4 B. & C. 290. *Shaw v. Picton*, Ib. 729. *Shaw v. Dartnall*, 6 Ib. 65. *Shaw v. Woodcock*, 7 Ib. 85. *Reg. v. Treasury*

(Lords), 16 Q. B. 362. *GIBBS, J., Brisbane v. Dacres*, 5 Taunt. 152. And see *Cave v. Mills*, 7 H. & N. 913; 31 L. J., Ex. 265.

(*p*) *Watson v. Moore*, 33 Law T. R. 123. *Shand v. Grant*, 15 C. B. N. S., 324. *Freeman v. Jeffries*, L. R., 4 Ex. 189; 38 L. J., Ex. 116.

(*q*) *Lee v. Merrott*, 8 Q. B. 820

from him to return it to the rightful owner, whose title to it can not be destroyed and annulled by the fraudulent and unjust dispossession. (*r*) When a man's goods have been taken by an act of trespass, and have been subsequently sold by the trespasser and turned into money, he may sue for money had and received. (*s*) It has been held, that the defendant is indebted to the plaintiff in respect of "money had and received by the defendant for the use of the plaintiff," in the following cases: where a man, having a claim or lien to a certain amount on goods and securities in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or, having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods or securities, is obliged to satisfy and discharge the extortionate demand; (*t*) where a railway company or carrier makes excessive charges for the conveyance of goods, and the consignee, in order to get possession of the goods, pays the extortionate demand; (*u*) where a married man, pretending to be single, marries a lady, and under color of such pretended marriage, gets possession of her estates, and receives the rents; (*x*) where one man takes and wrongfully pledges, (*y*) or sells, the goods of another, and

(*r*) *Neate v. Harding*, 6 Exch., 349; 20 L. J., Ex. 250. *Chowne v. Baylis*, 31 L. J., Ch. 757.

(*s*) *Rodgers v. Maw*, 15 M. & W. 448.

(*t*) *Astley v. Reynolds*, 2 Str. 915. *Shaw v. Woodcock*, 9 D. & R. 889, 92.

(*u*) *Ashmole v. Wainwright*, 2 Q. B. 837. *Kent v. Great Western Railway Company*, 3 C. B. 715. *Parker v.*

Bristol and Exeter Railway Company 6 Exch. 702; 30 L. J., Ex. 442. *Baxendale v. Great Western Railway Company*, 16 C. B., N. S., 137; 32 L. J., C. P. 225; 33 Ib. 197. *Tamraco v. Simpson*, 19 C. B., N. S., 453; 34 L. J., C. P. 268. *Great Western Ry. Co. v. Sutton*, L. R., 4 H. L. 226; 38 L. J. Ex. 177.

(*x*) *Hasser v. Wallis*, Salk. 28.

(*y*) *Allanson v. Atkinson*, 1 M. & S.

receives the price; (*z*) or claims or receives rents or money under a false or pretended authority, (*a*) or under the coercion of threatened penal proceedings; (*b*) or wrongfully usurps the office of another, and receives the fees annexed thereto; (*c*) or receives a masquerade ticket to be sold or re-delivered, and refuses to re-deliver it, the presumption being in such a case that he has sold it and received the money. (*d*)

The action upon such implied promise lies also against an agent who wrongfully demands and receives money in the name and on behalf of his principal, although he may have paid the money over to the latter; (*e*) or a principal who has obtained money through the medium of a fraud committed by his agent; (*f*) or a solicitor who wrongfully exacts money, either on his own account or on behalf of his client, as the price of the liberation of deeds or securities unjustly and illegally detained by him on behalf of such client; (*g*) or who extorts more than the principal and interest due on a mortgage deed, and the costs, under a threat of the exercise of a power of sale; (*h*) or a parish clerk who demands and receives on behalf of the rector a greater sum for searches in the parish register than he is entitled to charge; (*i*) or a vestry clerk who wrongfully receives

(*z*) *Lamine v. Dorrell*, 2 Ld. Raym. 1216. *Edwards v. Scarsbrook*, 3 B. & S. 280; 32 L. J., Q. B. 45.

(*a*) *Robson v. Eaton*, 1 T. R. 62. *Dupen v. Keeling*, 4 C. & P. 102.

(*b*) *Unwin v. Leaper*, 1 M. & Gr. 752.

(*c*) *Howard v. Wood*, 2 Lev. 245; 2 Jon. 127. *Arris v. Stukeley*, 2 Mod. 263. *Hall v. Swansea*, 5 Q. B. 548. *Boyter v. Dodsworth*, 6 T. R. 681.

(*d*) *Longchamp v. Kenny*, 1 Doug 137.

(*e*) *Snowden v. Davis*, 1 Taunt. 359. But see *Holland v. Russell*, 30 L. J., Q. B. 308.

(*f*) *Crockford v. Winter*, 1 Campb. 127.

(*g*) *Smith v. Sleaf*, 12 M. & W. 588. *Wakefield v. Newbon*, 6 Q. B. 280; 13 L. J., Q. B. 258.

(*h*) *Close v. Phipps*, 8 Sc. N. R. 381; 7 M. & Gr. 586. See *Fraser v. Pendlebury*, 31 L. J., C. P. 1.

(*i*) *Steele v. Williams* 8 Exch. 625.

and detains, by the direction of the vestry burial fees which belong to the rector; (*k*) or a steward of a manor who exacts exorbitant fees from tenants on their admittance; (*l*) or who demands and receives an extravagant charge, as the condition of his producing deeds and court rolls in his custody, which the party paying the money could not do without and which the steward ought to have produced on tender of a reasonable compensation; (*m*) or a broker in possession of goods under a distress who demands and receives unauthorized and excessive charges; (*n*) or a sheriff who exacts a larger fee than the law allows for executing the Queen's writ; (*o*) or who obtains money under the pressure of an illegal arrest; (*p*) or under a threat to sell goods seized under a *fi. fa.* which he has no right to sell; (*q*) or a justice of the peace who exacts a fee from a publican as the condition of granting him a license; (*r*) or a toll collector who exacts an illegal or unauthorized toll; (*s*) or an overseer of the poor who levies money by seizing and selling goods upon a magistrate's conviction which is afterwards quashed; (*t*) or a revenue officer who unlawfully seizes goods as forfeited, and unlawfully detains them, and takes money which he has no right to take as the condition of their release; (*u*) or a nurse who, upon the death of a person she

(*k*) *Spry v. Emperor*, 6 M. & W. 339.

(*l*) *Traherne v. Gardener*, 5 Ell. & Bl. 942.

(*m*) *Spry v. Pigott*, cited 2 Esp. 723.

(*n*) *Hills v. Street*, 2 Moo. & P. 103.

(*o*) *Dew v. Parsons*, 2 B. & Ald. 562.

(*p*) *Payne v. Chapman*, 4 Ad. & E. 364. *Baron de Mesnil v. Dakin*, L.

R., 3 Q. B. 18; 37 L. J., Q. B. 42.

(*q*) *Valpy v. Manley*, 1 C. B. 602.

(*r*) *Morgan v. Palmer*, 2 B. & C. 729; 4 D. & R. 283.

(*s*) *Lewis v. Hammond*, 2 B. & A. 206. *Waterhouse v. Keen*, 4 B. & C. 200; 6 D. & R. 257.

(*t*) *Feltham v. Terry*, Bull., N. P. 131, a; cited 1 T. R. 387. 1 Cowp. 419.

(*u*) *Irving v. Wilson*, 4 T. R. 485. *Atlee v. Backhouse*, 3 M. & W. 645.

attends, carries away his money; (*x*) or a creditor who has received money as the condition of his signing a bankrupt's certificate; (*y*) or who has received money from a bankrupt as the price of his discharge from an arrest, having at the time notice of the bankruptcy; (*z*) or who has openly joined other creditors in executing a deed of composition, with a debtor consenting to take a composition, but has privately stipulated for and accepted payment of the residue of his debt, and the action is brought to recover back the amount so paid. (*a*)

The action upon such implied promise lies, moreover, against all persons who extort money for doing what they are by law bound to do without payment or reward; (*b*) and who receive and have in their possession and wrongfully detain the money of another; "for," as it has been justly observed, "no man will venture to take, if he knows that he is liable to refund." (*c*)

1411. *Money received upon a consideration that has failed.*—The law raises also an implied promise to pay back money that has been received without consideration, or upon a consideration that has failed; and an action may be maintained upon such implied promise by the grantee of an annuity to recover back money paid for an annuity which has been set aside, or has become void for want of registry or enrollment; (*d*) also to recover money paid to an auctioneer as a

(*x*) *Thomas v. Whip*, Bull., N. P. 130, a.

(*y*) *Smith v. Bromley*, 2 Doug. 697, in notis. *Sievers v. Boswell*, 4 Sc. N. R. 173.

(*z*) *Follett v. Hoppe*, 17 L. J., C. P. 76.

(*a*) *Pradshaw v. Bradshaw*, 9 M. & W. 29. *Smith v. Cuff*, 6 M. & S. 160.

Atkinson v. Denby, 7 H. & N. 934; 31 L. J., Ex. 362. *Clay v. Ray*, 17 C. B., N. S., 188. *Geere v. Mare*, 2 H. & C. 339; 33 L. J., Ex. 50.

(*b*) *Parker v. Great Western Railway Company*, 7 Sc. N. R. 835, 874.

(*c*) *Jones v. Barkley*, 2 Doug. 690.

(*d*) *Shore v. Webb*, 1 T. R. 732. *Scurfield v. Gowland*, 6 East, 241

deposit on the sale of an estate, when the title is defective, and the purchase consequently can not be completed; (*e*) or if the estate does not correspond with the description given of it in a printed particular; (*f*) or money paid to a broker by his principal in the belief that an order has been duly executed, where the contract made by the broker is not in compliance with the order; (*g*) also to recover money received as a consideration or bonus for a lease by a person who is subsequently found to have no right to grant the lease; (*h*) or paid on a conditional sale which has been abandoned or rescinded, and the goods returned; (*i*) or on a purchase of a good-will or fixtures, shares or chattels, when the things contracted for, or some of them, have not been transferred or delivered; (*k*) or on the purchase of goods sold by the vendor as his own, which the true owner has claimed from the purchaser; (*l*) or money paid as a premium upon a policy of insurance, when the risk insured against was not run; (*m*) or money paid on a bill of exchange, where there is no consideration for the bill, (*n*) or the consideration has failed; (*o*) or to the promoters of a scheme, who promise to carry out

Davis v. Bryan, 6 B. & C. 656. Waters v. Mansell, 3 Taunt. 56. Huggins v. Coates, 5 Q. B. 432; 13 L. J., Q. B. 46. Turner v. Browne, 3 C. B. 157; 15 L. J., C. P. 223. Weddell v. Lynam, 2 Esp. 310.

(*c*) Burrough v. Skinner, 5 Burr. 2639.

(*f*) *Ante*.

(*g*) Bostock v. Jardine, 3 H. & C. 700; 34 L. J., Ex. 142.

(*h*) Cripps v. Reade, 6 T. R. 606. Wright v. Colls, 19 L. J., C. P. 60; 8 C. B. 164.

(*i*) Hurst v. Orbell, 8 Ad. & E.

107. Street v. Blay, 2 B. & Ad 462.

(*k*) Anon., 1 Str. 467. Wright v. Newton, 2 C. M. & R. 127. Wilkinson v. Lloyd, 7 Q. B. 44. Devaux v. Conolly, 8 C. B. 640; 19 L. J., C. P. 71.

(*l*) Nichols v. Bannister, 34 L. J., C. P. 105.

(*m*) Stevenson v. Snow, 3 Burr. 1240.

(*n*) Cobden v. Kendrick, 4 T. R. 432.

(*o*) Hooper v. Treffry, 1 Exch. 17; 16 L. J., Ex. 233.

their plan for the benefit of the subscribers, but afterwards abandon it without their consent; (*p*) or money paid to parish officers for the support of a bastard child, when the child dies before the money has been expended; (*q*) or conduct-money paid to a party upon a subpoena as a witness, where the cause is settled, and the subpoena is not acted upon; (*r*) or to the holder of a bill, or bank-note, or other security, who has presented it to the plaintiff to be discounted, and got the money, and the bill turns out to be a forgery, (*s*) if the plaintiff has given prompt notice of the forgery to the holder, and has not been guilty of laches. (*t*) The action also may be maintained to recover back money received under a special contract which has been abandoned or rescinded, or the performance of which has been prevented by the wrongful act of the party who has received the money. (*u*)

1412. Money received under an illegal contract.—The law also, so long as an illegal contract continues executory, implies from the person who has received money in furtherance of the execution of the contract, a promise to refund it in favor of the party who paid the money, and who repudiates the illegal transaction; (*x*) and an action upon this implied promise may be maintained against a person who has received money upon an illegal

(*p*) Nockells v. Crosby, 5 D. & R. 751; 3 B. & C. 824. Kempson v. Saunders, 4 Bing. 5; 12 Moore, 44.

(*q*) Chappell v. Poles, 2 M. & W. 307.

(*r*) Martin v. Andrews, 7 Ell. & Bl. 1; 26 L. J., Q. B. 39.

(*s*) Jones v. Ryde, 5 Taunt. 488; 1 Marsh. 162. Wilkinson v. Johnston, 3 B. & C. 428; 5 D. & R. 403. Fuller v. Smith, R. & M. 49. Gurney v. Womersley, 4 Ell. & Bl. 143.

(*t*) Price v. Neale, 3 Burr. 1357; 1 W. Bl. 390. Smith v. Mercer, 6 Taunt. 76. Cocks v. Masterman, 9 B. & C. 902.

(*u*) Towers v. Barrett, 1 T. R. 133. Giles v. Edwards, 7 T. R. 181. Smith v. Mundy, 29 L. J., Q. B. 172. Ehrensperger v. Anderson, 3 Exch. 159.

(*x*) Palyart v. Leckie, 6 M. & S. 290.

insurance or wager, at any time before the happening of the event which is to decide the adventure; (*y*) also against a stakeholder with whom money has been deposited to abide the event of an illegal wager, who has not paid over the money to the winner, or who pays it over after he has received notice not to do so from the party who has deposited the money in his hands; (*z*) and against parish officers who wrongfully receive money under an illegal contract, although they have quitted office, and hand over the money received to their successors. (*a*) The law also implies a promise to refund money received under an illegal contract, where the plaintiff does not stand in *pari delicto* with the defendant. Where contracts, for example, are prohibited by statute, for the purpose of preventing one set of men from taking advantage of the necessities of others, and money is paid upon such contracts by one of those whom the law intended to protect, the person who has so paid his money does not stand in *pari delicto* with the person who has received it, and may, after the forbidden transaction is completed, bring an action upon a promise implied by law from the person who has got the money, to refund it. (*b*) An action upon such implied promise may be maintained to recover back money privately paid to a creditor to induce him to sign a bankrupt's certificate, (*c*) or to recover

(*y*) *Varney v. Hickman*, 17 L. J., C. P. 102; 5 C. B. 271. *Clarke v. Shee*, 1 Cowp. 197. *Tenant v. Eliot*, 1 B. & P. 3. *Farmer v. Russell*, *Ib.* 296. *Tappenden v. Randall*, 2 B. & P. 467.

(*z*) *Hudson v. Terrill*, 1 C. & M. 797; 3 Tyr. 929. *Robinson v. Mearns*, 6 D. & R. 26. *Hastelow v. Jackson*, 8 B. & C. 221. *Mearing v.*

Hellings, 14 N. & W. 711; 15 L. J., Ex. 168. *Hickard v. Bankes*, 13 East, 20. *Bone v. Eckless*, 5 H. & N. 925; 29 L. J., Ex. 438.

(*a*) *Chappell v. Poles*, 2 M. & W 867.

(*b*) *Williams v. Hedley*, 8 East, 378

(*c*) *Lowry v. Bourdieu*, 2 Doug. 472
Atkinson v. Denby, 7 H. & N. 934
31 L. J., Ex. 362.

from a creditor money paid to the indorsee of a bill of exchange, or the assignee of a policy of insurance, originally given to the creditor to induce him to sign a composition deed, (*d*) or money paid to a lottery-office keeper for insuring tickets contrary to the statute. (*e*)

1413. *Money received by agents.*—If a broker or commission agent employed to sell, effects a sale and receives the purchase money, and refuses to pay over the amount to his employer, after deducting his commission, an action for money had and received may be maintained against him; (*f*) also against a sharebroker who has received money for his principal to buy shares, and the authority to buy is countermanded before the purchase has been made; (*g*) but not where the commission has been executed before countermand, and the shares have been bought, although they may subsequently turn out to be forgeries. (*h*) If an agent refuses to account for goods delivered to him for sale, it shall be presumed after a reasonable time that he has sold them and received the proceeds in money. (*i*) A solicitor employed to sell real estate, who, as the agent of the vendor, receives a deposit from the purchaser, is not entitled to retain it as a stakeholder until the completion of the purchase, but must pay it over to the vendor on demand. (*k*)

The mere circumstance of money having been paid by a principal to his agent, with directions to

(*d*) *Smith v. Cuff*, 6 M. & S. 165, 166. *Alsager v. Spaulding*, 4 Bing., N. S., 407; 6 Scott 204. *Smith v. Bromley*, 2 Doug. 695.

(*e*) *Jaques v. Withy*, 1 H. Bl. 65; 2 Bl. R. 1073. *Clarke v. Shee*, 1 Cowp. 197. *Browning v. Morris*, 2 Id. 790.

(*f*) *Bousfield v. Wilson*, 16 M. & W. 185.

(*g*) *Fletcher v. Marshall*, 15 M. & W. 763.

(*h*) *Lambert v. Heath*, *Ib.* 486.

(*i*) *Hunter v. Welsh*, 1 Stark. 224.

(*k*) *Edgell v. Day*, 35 L. J., C. P. 7

pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received. (*l*) Whenever one man agrees to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if it were not absolutely immoral or illegal, the person so receiving it can not be permitted to gainsay his having received it for the use of the other. (*m*) If an agent authorized to receive money for his principal employs a third party to receive it, there is, it seems, no implied promise from the latter to pay over the money to the principal, but only to his own immediate employer, the agent. Therefore, if a client in the country employs a country solicitor to recover a debt, and the money is received by the town agent of the country solicitor, such money is not money had and received by him for the use of the client, but for the use of his own employer; and the client consequently can not recover it from the town agent. (*n*) But the town agent may, under certain circumstances, make himself liable to the client in respect of money received by him; and the court, in the exercise of its summary jurisdiction over its own officers, will often compel a London agent to pay such money to the client, "to enforce justice according to the equity of the individual case." (*o*)

It is a general rule of law that, if money be paid

(*l*) *Moore v. Bushell*, 27 L. J., Ex. 3.
 3. *Hill v. Royds*, L. R., 8 Eq. 290;
 38 L. J., Ch. 538.

(*m*) *Griffith v. Young*, 12 East,
 314.

(*n*) *Cobb v. Becke*, 6 Q. B. 930.

Robbins v. Fennell, 11 Q. B. 248; 17
 L. J., Q. B. 77. *Hurley v. Baker*, 16
 M. & W. 26.

(*o*) *Robbins v. Heath*, 12 Jur. 158.
Hanby v. Cassin, 11 Jur. 1088; 17 L.
 J., Q. B. 79.

to a known agent for the use of his principal, an action for money had and received can not be sustained against the agent, if it appears that the principal has the least color of right to the money ; for the courts will not try the right of the principal in an action against the agent. But, if the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over at the time he receives notice of the mistake, or if he has not given credit in account to his principal for it, and the account has not been stated and settled between them on that footing. (*p*) If, however, he has got money into his own hands by a wrongful detainer of goods, or by his own illegal act, he can not discharge himself from liability by paying it over. (*q*)

1414. *Receipt of foreign money.*—It is immaterial whether the money received by the defendant was English money or foreign currency. (*r*)

SECTION IV

IMPLIED PROMISES IN RESPECT OF ACCOUNTS STATED.

1415. *Of the implied promise in respect of an account stated.*—If an account has been stated and settled between persons who have cross claims against each other, the law implies a promise, from those against whom the balance appears, to pay over the

(*p*) *Holland v. Russell*, 1 B. & S. 424 ; 4 B. & S. 14 ; 30 L. J., Q. B. 308 ; 32 Ib. 297. *Shand v. Grant*, 15 C. B., N. S., 224. *Lloyd v. Sandiland*, 13 Gow. 13. (*q*) *Oates v. Hudson*, 6 Exch. 348. (*r*) *Ehrensperger v. Anderson*, 3 Exch. 157.

amount of such balance to the others; and any admission made by the defendant of some definite balance being against him, or of a sum certain being due from him to the plaintiff, will be evidence of an "account stated," and raise an implied promise to pay over the amount. (*s*) And the promise will be implied where the account is stated in respect of one item only as well as in the case of a plurality of items; (*t*) but a general admission of liability to a pecuniary demand, without specifying the amount of it, will not support an "account stated," and will not entitle the plaintiff to recover nominal damages. (*u*) Nor is an offer to pay a sum less than the sum claimed, if unaccepted, any evidence of an account stated in an action for the larger sum. (*x*) An I O U, being a distinct admission of a sum due, is *prima facie* evidence of an account stated, and of a promise to pay the amount to the person who is in possession of the document; (*y*) but the effect of it may be got rid of, where it is the only item of evidence of account, by showing that there was no debt and no demand which could be enforced by virtue of it. (*z*) Where the plaintiff lent money to A upon B's promise to become surety for its repayment, and, on the money being advanced, A and B signed and delivered to the plaintiff the follow-

(*s*) Knowles v. Michel, 13 East, 249. Laycock v. Pickles, 4 B. & S. 497; 33 L. J., Q. B. 43. Prouting v. Hammond, 8 Taunt. 688; Gow. 41. Ashby v. Ashby, 3 Moo. & A. 186. Porter v. Cooper, 1 C. M. & R. 294, 5. Davies v. Wilkinson, 10 Ad. & E. 98. Chisman v. Count, 2 Sc. N. R. 569. Purdon v. Purdon, 10 M. & W. 562. Penny v. Slade, 15 L. J., Q. B. 10; 8 Q. B. 115.

(*t*) Highmore v. Primrose, 5 M. & S. 67.

(*u*) Lane v. Hill, 21 L. J., Q. B. 318; 16 Jur. 496. Bernasconi v. Anderson, 1 M. & M. 183.

(*x*) Atkinson v. Woodall, 31 L. J., M. C. 174.

(*y*) Payne v. Jenkins, 4 C. & P. 324. Curtis v. Richards, 1 Sc. N. R. 155; 1 Man. & Gr. 46. Gould v. Coombs, 1 C. B. 543. Fesenmayer v. Adcock, 19 M. & W. 450.

(*z*) Lemere v. Elliott, 6 H. & N. 656; 30 L. J., Ex. 350.

ing memorandum—"We jointly and severally owe you £60," it was held to be evidence of an account stated by A and B jointly. (a) The law also will imply a promise to pay over money where the drawer of a bill over-due and unpaid has promised to pay the indorsee and holder; (b) also, where partners have settled accounts on the close of their partnership, and an ascertained balance is admitted to be due from the one to the other. Wherever the defendant has got the benefit of the fulfillment of a contract, performance of which could not have been enforced by reason of the Statute of Frauds, and has subsequently admitted that a certain sum is due to the plaintiff in respect thereof, the debt so admitted may be recovered on an account stated, although no action could have been maintained upon the original contract. (c) Thus, where the defendant agreed to pay the plaintiff £100, if the plaintiff would surrender a farm to the defendant, and get the landlord to accept the defendant as tenant in the place of the plaintiff, and the change of tenancy was effected, and the defendant afterwards admitted that he owed the plaintiff the £100, it was held that the plaintiff was entitled to recover the money on the account stated. (d) But the law implies no promise from an infant, or lunatic, or person incapable of contracting, in respect of an account stated. (e) Nor can a claim which is absolutely void by reason of an illegality or immorality in the consideration, or for want of consideration, as a promise to pay money to counsel for services connected with liti-

(a) *Buck v. Hurst*, L. R., 1 C. P. 297.

(b) *Oliver v. Dovatt*, 2 M. & Rob. 230.

(c) *Salmon v. Watson*, 4 Moore, 73.

(d) *Cocking v. Ward*, 1 C. B. 858
Griffith v. Young, *ante*. Seago v
 Deane, 4 Bing. 459; 1 M. & P. 227.

(e) *Tarbut v. Vispham*, 2 M. & W. 7.

gation, be relied upon in support of a count upon an account stated. (*f*) And an admission by the defendant of a debt due to a solicitor for his services as such will not enable the solicitor to recover on an account stated so as to defeat the provisions of the statute requiring a signed bill to be delivered by the solicitor before action. (*g*)

1416. *Account stated with trustees.*—If a trustee states an account with his cestui que trust, and admits that he has money in his hands applicable to a claim made on him by the latter, he is no longer a trustee merely of that money, but becomes liable as a debtor to the cestui que trust. (*h*) If he acknowledges that he owes the latter a specific sum, the law implies a promise from him to pay the amount. But so long as the trust remains open, and the accounts are unadjusted, and an ascertained balance has not been admitted to be due, or if admitted, has been the result of a clear mistake, no such implied promise arises. (*i*) Where a creditor received goods from his debtor upon trust to sell and apply the proceeds in liquidation of the debt due to him, and hand over any balance that might remain to the debtor after the sale, and the goods were sold, and the creditor admitted that he had a balance in hand of £5 19s., it was held that he was liable for the amount on an “account stated.” (*k*) But, where trustees for the separate use of the wife admitted that they had received and held a certain sum to her separate use, and refused to pay it over

(*f*) Kennedy v. Broun, 13 C. B., N. S., 677; 32 L. J., C. P. 137. Lubbock v. Tribe, 3 M. & W. 613.

(*g*) Brooks v. Bockett, 9 Q. B. 847. Scadding v. Eyles, 9 Q. B. 858.

(*h*) Topham v. Morecraft, 8 Ell. & Bl. 983.

(*i*) Roper v. Holland, 3 Ad. & E. 99.

(*k*) Howard v. Brownhill 23 L. J., Q. B. 23

without her separate receipt, it was held that an action on an account stated would not lie by the husband and wife for the sum so admitted to be due to her. (*l*)

A defendant who has admitted that he owes a certain sum of money to the plaintiff, and has recognized the title of the latter to the money, can not of his own accord set up a *jus tertii* for the purpose of defeating the plaintiff's claim; (*m*) but, if the plaintiff was only an agent in the transaction dealing on behalf of an undisclosed principal, and the latter intervenes and gives the defendant notice not to pay the debt to the plaintiff, the defendant's liability to the latter is discharged. (*n*)

1417. *Settlement of mutual accounts.*—Where there are mutual accounts and mutual debts and credits, and the parties meet and settle their respective claims and liabilities, and strike a balance, the account an not be re-opened on the ground of the existence of overcharges or insufficient charges, or on the ground of some mistake as to legal rights, (*o*) or on the ground that some of the claims and demands so taken into account were demands for which no action could have been maintained, or were only equitable or moral claims. "The real account stated," observes BLACKBURN, J., "called in our old law an *insimul computasent*, is where several items of claim are brought into account on either side, and, being set one against another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid, a discharge given for each, and in considera-

(*l*) *Bond v. Nurse*, 16 L. J., Q. B. 196.

(*m*) *Peacock v. Harris*, 10 East, 24.

107.

(*n*) *Ante*.

(*o*) *Dawson v. Remnant*, 6 Esp.

tion of that discharge the balance was agreed to be due." It is not necessary, in order to make out an account stated of this sort, that the debts should be debts in præsentī, or that they should be legal debts, (*p*) or be legally recoverable; for, where parties having cross demands against each other settled and balanced their accounts, and an action was brought for the balance, it was held that the settlement bound the defendant, and that he could not set up as a defense that some of the items of the account with which he had been debited were not recoverable by reason of the statute regulating the sale of spirituous liquors, (*q*) or by reason of the Statute of Frauds. (*r*) In these cases of a real account stated, the claims and demands on either side are merged in the account stated, so that the parties can not afterwards resort to them. Thus, if A sell his horse to B for £10, and, there being divers other dealings between them, they come to an account upon the whole, and B is found in arrear £5, A must sue for the balance upon the account stated, for his claim for the price of the horse is discharged. (*s*)

1418. *Mistakes in accounts.*—But a party who has admitted the correctness of an account is not conclusively bound by it. (*t*) He may show that the admission was made under a mistake, (*u*) or that certain items were miscalculated or founded in error, (*x*) provided the correction is promptly made before the other

(*p*) Laycock v. Pickles, 4 B. & S. 506; 33 L. J., Q. B. 47.

(*q*) Dawson v. Remnant, 6 Esp. 24.

(*r*) Laycock v. Pickles, *supra*.

(*s*) NORTH, C. J. Milward v. Ingram, 2 Mod. 44. Laycock v. Pickles, *supra*.

(*t*) Shand v. Grant, 15 C. B., N. S. 324.

(*u*) Thomas v. Hawkes, 8 M. & W. 140.

(*x*) Rose v. Savory, 2 Sc. 199; 2 Bing. N. C. 145. Cox v. Prentice, 3 M. & S. 344. Lucas v. Worswick, 1 Moo. & Rob. 295.

party has innocently acted upon the faith of the correctness of the account, and altered his previous position so as to render it inequitable to call upon him to refund the money. (*γ*)

(*γ*) HOLT, C. J., *Spuraway v. Rogers*, 12 Mod. 517. *Dawson v. Remnant*, 6 Esp. 24. *Knox v. Whalley*, 1 Esp. 1. *Skyring v. Greenwood*, Shaw v. Picton, *Lee v. Merritt*, Shand v. Grant, *ante*.

III.—34

END OF VOLUME III.

GENERAL INDEX.

[THE REFERENCES ARE TO THE SECTIONS.]

Abandonment

- of legal proceedings a good consideration for a promise 14
- in cases of marine insurance, 1182
 - notice of, 1182
 - by whom to be given, 1183
 - form of, 1134
 - effect of, 1185
 - when the insured may abandon, 1187
 - unreasonable abandonment, 1189
- See* MARITIME INSURANCE.
- of inchoate railway and joint-stock companies, 1347
- of contracts to marry, 1359

Abatement

- of contract price by reason of defects in things sold, 591
- by reason of defective execution of work, 864

Abroad,

- contracts made, 238
- debts contracted by bankrupt, 401

Abstract of title,

- time of delivery of, 513
- See* SALE OF LAND.

Acceptance

- of biddings at an auction 21
- of offers through the post, 22
 - by telegram, 22
- of part of a debt in satisfaction of the whole, 328
- of money orders, &c., operating by way of novation and substitution, 374
- of specialty securities in satisfaction of simple contract debts, 379
- of bills of lading, delivery orders, and dock warrants transferring the property, 560
- of a guarantee, 1117
- of money-orders, drafts, and bills of exchange, 1248
 - proof of, 1249
 - See* BILL OF EXCHANGE.

Acceptance and actual receipt

- of goods within the statute of frauds, 207, 554
- articles taken on trial or for inspection, 555
- receipt without acceptance, 554
- constructive acceptance and receipt, 558
 - delivery by vendor to a carrier or wharfinger on behalf of the purchaser, 561
- acceptance before receipt, 559
- of delivery orders and dock warrants, 560
- part acceptance and actual receipt, 562
- effect of acceptance, 562

See DELIVERY ORDER—SALE OF GOODS.

Acceptilation,

- nature of, 200

Acceptor

- of bill of exchange, liability of, 1251
- days of grace, 1256
- acceptance by agents, 1285
 - by partners, 1287
- by directors of companies, 1288, 1289

See BILL OF EXCHANGE.

Accessory agreement,

- specific performance of, 497

Accident,

- insurance against, 1236
- damages recoverable, 1237

Accommodation bills and notes,

- right of accommodation acceptor, maker, or indorser to be indemnified, 1138
- contribution between the parties to, 1139
 - See* CONTRIBUTION.
- when the holder is bound to prove that he gave value, 1244
- right of action on, 1246
- indorsement of, when overdue, 1247
- presentment of, when excused, 1255

See BILL OF EXCHANGE.

Accord and satisfaction,

- substituted performance of something different from what was stipulated to be done, 376
- discharge by, 377
 - accord, executory, 378
 - acceptance of specialty securities as additional securities, 379
 - composition deeds and agreements, 380
- transfer of property by way of, 381
 - effect of inadequacy of price, 383
 - absence of valuation, 382
 - transfer of possession, 384
 - avoidance of transfer as a fraudulent preference, 385
 - as an act of bankruptcy, 386

Accord and satisfaction—Continued.

when one of several joint-plaintiffs, 387

See PAYMENT—APPROPRIATION OF PAYMENTS.

Account stated,

nature of, 1415

with trustees, 1416

settlement of mutual accounts, 1417

mistakes in, 1418

Acknowledgment

under seal, 23

See BOND.

by matter of record, 29

Acknowledgment of debts

contracted during infancy, 160

extending the period of limitation, 409

authentication of, 411

lost, 412

by one of several joint-contractors, 413

by executors or administrators, 413

by one of several partners, 104

to whom to be made, 414

exemption of, from stamp duty, 415

Act of God,

loss by, 956

Act of parliament,

contract in contravention of, 259

Act of bankruptcy. *See* BANKRUPTCY.

Adjudication in bankruptcy,

effect of, 470

effect of annulling, 483

Adjustment,

of account to take debt out of statute of limitations, 419

of losses in maritime insurance, 1195

Administration,

of assets, 452

Administrator,

contracts with, 165

promise by, to answer damages out of his own estate, 209

de bonis non, 458

See EXECUTOR.

Admission,

written evidence of, admissible without a stamp, 415

See ACKNOWLEDGMENT OF DEBT.

Adultery,

effect of, on contracts made by a married woman, 178

on marriage settlements, 1371

See HUSBAND

Adverse claimants,

to chattels bailed, 809

Affreightment,

contracts of, 939

foreign, 240

Agent,

contracts with, 49

rights of principals upon, 49

principals contracting as agents, 50

concealment of agency, 51

rights of undisclosed principals, 51

proof of agency, 52

purchases in the name of one of several joint adventurers, 53

recovery of the money of the principal paid away by the agent, 54

rights of principals upon deeds made by agents, 55

liabilities of undisclosed principals on simple contracts, 56

authority of the agent to sign writings for the principal, 57

special authority, 58

contracts by infant agents, 59

subsequent ratification by the principal, 60

limitation of authority, 61

revocation of authority, 62

misrepresentation and fraudulent concealment by agents, 63

liability of principals on contracts under seal, 64

warranties by agents, 65, 631

representations not amounting to a warranty, 66

representations forming no part of the contract with the principal, 67

purchases by a servant in the name of his master, 68

authority of foremen and managers, 69

of telegraph clerks, 70

of shipmasters, 71

limitation of the authority of, 72

of stockbrokers, 73

of counsel, 74

rights of agents on simple contracts, 75

factors, auctioneers, and policy-brokers, 76

repudiation of the contract by the principal, 77

pretended assumption of agency, 78

rights of agents on contracts under seal, 79

liabilities of agents on simple contracts, 80

contracts on behalf of foreign principals, 81

undisclosed agencies, 82

notoriety of agency, 82

public officers, 83

masters of ships, 84

pretended agencies, 85

irresponsible principals, 86

government agents, 86

Agent—Continued.

- money received by agents for their principal, 87, 1067
- money wrongfully and illegally received by agents, 88
- receipt of money by agents to be paid over to a stranger, 89, 1413
- liabilities of agents on contracts under seal, 90
 - exemption of public officers, 91
 - execution of deeds by agents not rendering them personally liable, 92
 - of joint-stock companies, 122
 - of banking co-partnerships, frauds by, 139
 - signatures by under the statute of frauds, 215
 - frauds by, 308
 - fraudulent concealment by the principal, 308
 - confidential, 313
- payments through, 342, 346
 - payment to an agent in the ordinary course of business, 346
- payments and settlements between principal and agent, 346
- payment by and to, extending the period of limitation, 422, 423
- sales by, 548
- demises by, 680
- indemnification of, 936
- damages for breach of warranty of authority by, 937
- of charterers, implied authority of, 950
- pledges by, 1079, 1081
- assurance of life by, 1225
- bills of exchange by, 1285
- promissory notes by, 1286

Agency,

- the contract of, 909
 - revocation of authority, 910
 - when the authority is irrevocable, 911
- accounting, 912
 - refusal to account, 912
- liabilities of brokers, factors, and commission agents, 913
 - liabilities of forwarding agents, 913
 - del credere commissions, 914
 - insurance brokers, 915
 - share and stock brokers, 916
 - solicitors, 917
 - sheriff's officers, 918
 - estate and house agents, 919
- extent of agent's authority, 920
- receipt of money and goods on account of the principal, 920
 - by sub-agents, 921
- payment by one agent to another, 922
- purchases by agents with the money of their principals, 923
- frauds by agents on their principals, 924
- payment of commission, 925
- extra work by agents, 926

Agency—*Continued.*

- rights of shipbrokers to commission, 927
- policy brokers, 928
- travellers for orders, 929
- house and estate agents and auctioneers, 930
- right of agent to be re-imbursed on revocation of authority, 931
- lien of factors and brokers, 932
- insurance brokers, 933
- solicitors, 934
- shipmasters, 935

Agisters,

- of cattle, liabilities of, 839

Agreements,

- requisites of, *see* CONTRACT—CONSIDERATION.
- for leases 201, 676

Agricultural usages,

- annexation of to leases, 244

Alien ami,

- contracts with, 193

Alien enemy,

- contracts with, 194, 274

Allotment,

- sale of letters of, 659
- See* SHARES

Alteration of contracts,

- release by, 388
- material and immaterial, 389
- evidence to explain, 390
- cancellation of contracts, 391
- in deeds after execution, 392
- filling up of blanks, 392
- of principal obligation discharging the surety 1127
- of bills and notes, 1280
- restamping altered contracts, 1080

Alterations in property

- after a sale and before a transfer, 521

Alternative stipulations, 319**Amalgamation**

- of companies, 1318

Ambassador,

- privilege of, 198

Ambiguity,

- latent, 222
- patent, 223

See INTERPRETATION.

Ancestor,

- liabilities of heir-at-law upon covenants of, 440

Anchors,

- illegal sale of, 288

Annuity,

assessment of, 431

specific performance of agreement for, 497

Annuity-deeds,

registration of, 1049

See RENTCHARGE.

Antecedent debts,

pledges for, by factors, 1080

Apartments. *See* FURNISHED HOUSES.

Apportionment,

of periodical payments, 358

of rent on assignment of the reversion, 706

Apprenticeship,

contracts of, 903

stamp on, 903

liabilities of parties to, 904

misconduct of the apprentice, 905

dissolution of, 905

by award of justices, 906

damages for breach of, 908

Appropriation,

of payment, 350

by debtor, 351

by creditor, 352

separate accounts and one entire running account, 353

Appurtenances,

what are, 682

Arbitration,

agreement to submit disputes to, 258

Arbitrator,

services of, gratuitous, 851

Architect,

biassed and corrupt decisions of, 860

negligence of, 861

Art,

oral evidence to explain terms of, 246

Artificers,

lien of, 872

See WORK AND SERVICES.

Assent

of parties to contracts, 20

conditional, admissibility of oral evidence of, 247

Assets,

administration of, 452

Assignees,

of shareholders in joint-stock companies, liabilities of, 1329

Assignment,

authentication of, 219

Assignment—Continued.

- in fraud of creditors and purchasers, 264, 381.
- of personal contracts, 426
- of debts and *choses in action* under the Supreme Court of Judicature Act, 426
- of policies of life assurance, 426, 940
- marine insurance, 426
- of bonds, 426
- of bills of lading, 426, 1291
- what is an, 427
 - notice of, 428
- of covenants, 430
- of rents, 428
- of annuities, 428
- of *choses in action*, when the foundation of a new contract, 429
- of term, liability of executors after, 450.
- of copyright, 657
- of patent rights, 658
- of lease after forfeiture, 722
- of securities by the creditor to a surety, 1140
- of policy of insurance against fire, 1218
- of bills of exchange and promissory notes, 1240
- of dock-warrants, 1292

See BILL OF SALE—COVENANTS RUNNING WITH THE LAND—NOVATION
AND SUBSTITUTION—BANKRUPTCY—DEATH.

Assignment for the Benefit of Creditors,

See COMPOSITION DEED.

Assumption,

- of agency, 78

Attornment. See SOLICITORS—AGENT.

Attornment,

- of warehousekeepers to the holder of a delivery order, 595.
- by tenant to landlord, 701, 725
- by mortgagor to mortgagee, 1022
- by tenant to mortgagee, 1023

Auction,

- sale by, 21, 215, 388
 - biddings at, 21, 389
 - puffers, 510.
 - without reserve, 510
- conditions and particulars, 510
- misdescription of thing sold, 520

Auctioneer,

- right of, on sales made by him, 76
- authority of, as agent for both vendor and purchaser, 215, 510
- deposit in the hands of, 526
 - liability of, for deposit, 811
- right of, to commission, 930

See AGENT—STAKEHOLDER.

Authentication,

- of contracts under seal, 24
 - See* DEED.
- of contracts by joint-stock companies, 122
- of simple contracts, 199
 - when necessary, 199.
 - by a signed writing, 200
- of executory contracts for the sale of goods, 207
 - requisites, 213
- signature, 213
- by agents, 213
- of promises made by infants, 217
- of acknowledgments to bar the statute of limitations, 411
- of leases, 219
- of contracts of service, 883
- of deposit of title deeds, 1042
- of marriage, 1352

Authority,

- of agent to make contracts, 57, 58
 - revocation of, 52, 910
 - breach of warranty of, 85, 937
 - damages recoverable, 936
 - when irrevocable, 911
 - coupled with an interest, 911

Average,

- in cases of insurance, 1191
 - See* GENERAL AVERAGE—PRIMAGE AND AVERAGE.

Avoidance,

- of contracts on the ground of fraud, 305
 - determination of the power, 312
 - effect of, 305, 316
- on the ground of duress, 314
- of payments, 354
- of contracts of sale of land, 535
- of sales of goods, 594, 610, 632
 - when the vendor can not avoid the contract, 641
 - when the purchaser can not avoid the contract, 640
 - determination of the election to avoid, 642
 - from want of title, 643
 - recovery of the purchase money, 643
 - sales of things not in existence, 644
 - effect of avoidance, 645
- of leases, 716, 760
 - provisoes for re-entry, 718
- of contracts for work and services, 853
- of mortgages, 1062
 - as against creditors, 1072
 - as against the trustee of a bankrupt mortgagor, 1074
- of policies of sea-insurance, 1201

Avoidance—Continued.

of bills and notes for want of consideration, 1279

of promises of marriage, 1354

See ILLEGAL CONTRACTS—FRAUD.

Award. *See* ARBITRATION.**Away-going Crops,**

tenant's right to, 753

Bail Bond,

assignment of, 426

See BOND.

Bailees,

insurance by, against fire, 1215

Bailment for hire,

nature and definition of, 784

duties of hirers of chattels, 785

use of chattels let to hire, 786

losses from negligence, 786

losses from piracy, robbery, disease, and accident, 787

determination of the bailment, 788

of money to be used for hire, 789

of money in the hands of bankers, 817

of materials to workmen, 879

See BAILMENT WITHOUT REWARD—WAREHOUSEMEN—CARRIERS

—COMMON CARRIERS.

Bailment without reward,

gratuitous loans, 790

liabilities of the borrower, 791

negligence of borrower, 791

loss from ordinary casualties, 792

misuser by borrower, 793

want of skill, 793

restoration of thing borrowed, 794

loss by robbery, fire, or inevitable accident, 995

eviction by title paramount, 795

implied obligations of the lender, 796

loans to one of several partners, 797

to registered companies, 798

damages in action for not replacing stock, 799

deposit or simple bailment, 800

what is necessary to constitute a deposit, 801

executory and executed promises, 801

liabilities of the depositary, 802

negligent keeping, 802

ordinary casualties, 802

carelessness on the part of the depositor in selecting a person
notoriously unfit to be trusted, 803

theft by the servant of the depositary, 804

Bailment without reward—*Continued.*

- use and enjoyment by the depositary of the subject-matter of the deposit, 805
- transfer of the deposit to a stranger, 806
- remedy of the depositor, 806
- restoration of the deposit, 807
- joint and several deposits, 808
- transfers of the subject-matter of the bailment, 809
- adverse claimants, 809
- eviction by title paramount, 810
- stakes in the hands of stakeholders to abide the event of a lawful game, 811
- power of the depositary to compel rival claimants to establish their title by interpleader, 812
- where the depositary holds possession wrongfully, 813
- liabilities resulting from the taking possession of goods by finding, 814
- liabilities of the depositor, 815
- deposit of money made with one of several partners, 816
- deposit of money with bankers, 817
 - limitation of actions to recover deposits in the hands of bankers, 817
 - deposit of bills, notes, and securities in the hands of bankers, 818
 - receipt of cheques by bankers on account of their customers, 819
 - duty of bankers to honor the drafts of their customers, 820
 - payment of cheques, 820
 - under suspicious circumstances, 821
 - negligence in payment of cheques, 821
 - joint accounts and joint deposits with bankers, 822
 - deposits and accounts with bankers in the names of trustees, agents, and receivers, 823
 - separate accounts opened by the same person in different capacities, 824
 - loss of trust money in the hands of bankers, 825
 - payment of forged cheques, drafts, and orders on bankers, 826
 - forgery facilitated by the negligence of the customer, 826
 - forged endorsements, 827
 - cheques paid by mistake, 828
 - payment of cheques at branch banks, 829
 - crossed cheques, 830
 - lien of bankers, 831
 - damages for non-payment of cheques, 832
- mandate or gratuitous commission**, 833
 - non-feasance and misfeasance, 834
 - bailment of money and chattels to be carried gratuitously**, 835
 - loss or damage from negligence, 835
 - bailments of chattels to be mended or repaired gratuitously**, 836
 - employment of unskillful persons, 836
 - custody and safe keeping of the chattel**, 837

Bailment without reward—Continued.

- bailment of money for investment, 838
- bailments of living animals, 839
 - negligent management, 839
- bailments of perishable commodities, 840
- use of the subject-matter of the mandates, 841
- theft and negligence by servants of the mandatary, 842
- payment of expenses, 843
- of taskwork, 844

See BANKERS—BORROWING.

Bankers,

- contracts with, 34
- payment between bankers and their customers, 348
- deposit of money with, 817
 - limitations of actions against, 817
- deposit of bills and securities with, 818
- receipt of cheques by, 819
- general duties and liabilities of, 820
 - payment of cheques, 820
 - under suspicious circumstances, 821
 - negligence in payment of cheques, 821
- joint accounts and joint deposits, 822
 - deposits and accounts in the names of trustees, agen'ts, and receivers, 822
- payment by, of forged cheques, drafts, and orders, 826
- cheques paid by mistake, 828
- payment of cheques at branch banks, 829
- crossed cheques, 830
- lien of, 831
- damages against for non-payment of cheques, 832

Bankers' drafts. *See* CHEQUE.**Banking companies,**

- registered under the Joint Stock Companies Act.
 - See* JOINT STOCK COMPANY.

Banking co-partnership,

- contracts with, 137
- liability for frauds of their servants and agents, 139
 - See* JOINT STOCK COMPANY.

Bank note,

- payment with stolen, 337
 - See* BILL OF EXCHANGE—PROMISSORY NOTE.

Bankrupt,

- payment to, 349
- transfer of executory contracts of, on bankruptcy, 471
- right of, to trust estates and equitable interests, 472
- contracts with, during the bankruptcy, 478
 - undischarged, rights of, 479
 - See* BANKRUPTCY.

Bankrupt acts,

contracts in contravention of the, 259

Bankruptcy,

contracts with bankrupts, 188

with trustees in, 189

contribution between trustees in, 190

payment to a bankrupt, 346

release by composition, 369

fraudulent preference by bankrupt, 380, 385

fraudulent transfer, an act of, 386

discharge of bankrupt from debts and causes of action 397

from rent and covenants in leases, and from contracts for the sale and purchase of realty, 397

liquidation by arrangement, 399

composition with creditors, 400

effect of discharge on debts contracted abroad, 401

effect of an adjudication in, 470

transfer of executory contracts, 471

trust estates and equitable interests not vesting in the trustee, 472

money in the hands of a bankrupt clothed with a specific trust, 473

sale of property of which the bankrupt was reputed owner. 474

sale of the bankrupt's book-debts, goodwill, &c., 475

transfer to the trustee of contracts in which the bankrupt is interested in right of his wife, 476

transfer to the trustee of the bankrupt's interest in a partnership, 477

contracts made with the bankrupt during, 478

rights of undischarged bankrupt, 479

liability of undischarged bankrupt, 480

liability of trustee upon the bankrupt's covenants and executory contracts, 481

disclaimer by the trustee, 482

effect of annulling the adjudication, 483

specific performance of sale of debts under, 497

bills of sale, constituting an act of, 1072

mortgages constituting an act of, 1073

of mortgagor, 1073

act of, revoking license to distrain, 1097

of shareholders in unregistered joint-stock companies, 1329

Bankruptcy of purchasers of chattels,

before payment of the purchase money, 594-605

countermand of delivery orders, 595-605

intervention of the rights of sub-purchasers, 603

See STOPPAGE IN TRANSITU.

Bargain and sale,

of lands, 504-541

of chattels, 543-651

See SALE.

Baron and feme. *See* HUSBAND.

Barratry,

insurance against, 1168

Barristers,

honorary character of services of, 851

Barter,

contracts of, 504

Benefices,

purchase of, 268

bonds for resigning, 269

illegal charges upon, 269

Benefit building societies,

contracts with, 150

liabilities of mortgaging shareholders, 150

See FRIENDLY SOCIETIES.

Betrothment,

contracts of, 1351

authentication of, 1352

performance of, 1352

time of performance, 1353

conditional 1355

avoidance of, by misrepresentation and deceit, 1356

abandonment of, 1359

damages for breach of, 1360

See PROMISE OF MARRIAGE.

Betting. *See* GAMING CONTRACTS.**Betting housekeepers,** 277**Biddings at auctions,** 21, 510

See AUCTION.

Bill of exchange,

foreign, interpretation of, 239

given to secure money lost at or lent for play, 279

recovery of money paid upon forged, 316

payment by, 333

acceptance of renewed, 334

debts secured by dishonored, 335

renunciation by parol of the holder's claim, 364

part payment by, taking a debt out of the statute of limitations, 417

transfer by indorsement and delivery, 1240

restrictive indorsements, 1241

who is to be deemed a *bona fide* holder by indorsement, 1242

intermediate infirmities of title, 1243

when the holder is bound to prove that he gave value for the bill, 1244

fraudulent transfers and indorsements, 1245

accommodation bills, 1246

indorsement of bills overdue, 1247

acceptance of, 1248

presentment for acceptance, 1248

proof of the acceptance, 1249

fictitious indorsee, 1250

Bill of exchange—Continued.

- liability of the acceptor, 1251
 - failure of consideration, 1251
- liability of the drawer and indorser, 1252
 - giving time for payment, 1253
 - presentment for payment, 1254
 - non-presentment, when excused, 1255
 - days of grace, 1256
 - notice of dishonor, 1257
 - what amounts to notice of dishonor, 1258
 - posting the notice, 1259
 - foreign bill, 1260
 - protest, 1260
 - noting, 1260
 - proof of notice of dishonor, 1261
 - dispensation of notice, 1262
- transfer by delivery without indorsement, 1263
- payment and satisfaction of, 1266
- bills taken up *supra* protest, 1264
- retiring of bills by acceptors and indorsers, 1265
- bills and notes for the payment of sums under £1, 1273
- bankers' cheques, 1275
- summary remedy for non-payment of bills, notes, and cheques, 1277
- cancellation of, 1278
- proof of want of consideration, 1279
- alteration of bills, 1280
 - immaterial alterations, 1281
- loss of bills and notes, 1282
- damages in action on, 1283, 1284
- acceptance by agents, 82, 1285
 - liability of agent on, 1286
- acceptance by partners, 101, 1287
 - in fraud of the firm, 101
- by directors or trustees of joint-stock companies, 1289
- by railway directors, 128

Bill of lading,

- acceptance of, 560
- shipment and carriage of goods under, 572, 951
- countermand of delivery under, 602
- transfer of, 604, 1291
- assignment of, 1291

See DEMURRAGE—STOPPAGE IN TRANSIT.

Bill of sale,

- fraudulent, 263, 381
 - marks of fraud, 381
- of ships, 649
- of fixtures, 651
- of goods and chattels, 1056
- of after-acquired property, 1057

Bill of sale—Continued.

by judgment debtors, 1058

registration of, 1059

renewal of, 1060

what is, 1061

apparent possession of grantor, 1062

requisites of the affidavit, 1063

description of the residence and occupation of the grantor 1064
of the attesting witness, 1065

proof of the time of execution, 1066

effect of, 1067

of assignment of, 1068

of agreement for, 1069

priority of holders of, 1070

evasion of registration, 1071

void as against creditors, 1072

constituting an act of bankruptcy, 1073

licenses to distrain, 1095

revocation of license by bankruptcy, 1097

registration of bills of sale of fixtures, 1107

*See FRAUD—AVOIDANCE OF CONTRACTS.***Board and lodging, 772***See LODGING-HOUSE KEEPERS.***Boards of health,**

contracts with, 1145

Bonds,

nature and requisites of, 230

foreign interpretation of, 239

recovery of money paid upon forged bonds, 316

assignable, 426

transfer of, by death, 446

penal obligations, 492

to secure faithful services, 1117, 1120

to partnerships and associations, 1121

by partners, 1143

by one partner in fraud of the others, 1143

by railway directors, 1335

to marry, 1350

*See PENALTIES.***Borrowing and lending,**

for gaming purposes, 280

nature and effect of the contract of, 789

loans of money, 789

general duties, obligations, and liabilities of the borrower, 791

restoration of things borrowed, 794

obligations and duties of the lender, 796

See BAILMENT WITHOUT REWARD.

by one of several partners, 797

Borrowing and lending—Continued.

by registered joint-stock companies, 798

by railway directors, 1334

Bottomry,

nature and effect of, 1099

when the shipmaster may borrow money on, 1100

priority of the latest bond, 1100

Bought and sold notes,

nature and effect, 551

signature of, by brokers, 214, 553

discrepancies between them and the entry in the broker's books, 551

Boundaries,

of estates, duty of tenants to preserve, 713

Breach,of contract. *See* CONTRACT.of covenant. *See* COVENANT.

of promise of marriage, 1360

See PROMISE OF MARRIAGE.of warranty. *See* WARRANTY.**Brokers,**

right of action of, for the price of goods sold by them, 76

of policy brokers on policy, 76

must be licensed, 294

sales by, 550

bought and sold notes, 551

agency of, 909, 936

rights and liabilities of, as between themselves and their principals,
913

insurance brokers, 915

share brokers, 916

stock brokers, 916

policy brokers, 928

lien of, 932

See AGENT—BOUGHT AND SOLD NOTES.**Bugs,**

nuisance of, rendering houses uninhabitable, 697

in the case of an unfurnished house, 697

in the case of ready-furnished apartments, 771

Building contracts,

specific performance of, 497

nature and effect of, 857

conditions precedent, 858

architect's certificate of approval, 859

See CERTIFICATE.

unfinished or defective work taken possession of by the employer, 863

substantial performance by builders, 864

abatement of contract price, 865

time of performance, 866

penalties to secure performance, 867

Building contracts—Continued.

- destruction of the work before payment, 869
- deviations from the contract, extras, measure and value, 870
- prevention of performance, 871, 881
- liabilities of builder for negligence and want of skill, 873
 - work rendered useless by negligence, 875
- damages for prevention of performance, 881

See WORK AND SERVICES.

Building societies. *See* BENEFIT BUILDING SOCIETIES.**Buying and selling.** *See* SALE.**Bye-laws,**

- of railway carriers, 1007

By-gone services,

- not constituting a valid consideration for a promise, 5
- rendered at the previous request of the promisor, 11

Calls,

- on shareholders, payment of, as between vendor and purchaser, 665, 669
- on contributories constituting specialty debts, 1323

See TRANSFER OF SHARES.

Cancellation,

- of contracts, 391
- of bills and notes, 391, 1278
- of leases, 761

Capture,

- loss by, 1166, 1188

Cargo,

- hypothecation of, 1103

Carriage of merchandise,

- on the high seas, 939
- on land, 976

See CARRIERS BY WATER—CHARTER PARTIES—CARRIERS BY LAND.

Carriers,

- delivery of goods to, by vendor, 571
- delivery under bill of lading, 572
- carriage of passengers, 976

See CARRIERS BY LAND—CARRIERS BY WATER—COMMON CARRIERS.

Carriers by land,

- not being common carriers, 976
- carriage of passengers and merchandise by, 976
 - injuries to passengers and goods, 976
 - loss of goods or money by the way, 977
- contracts for the transmission of messages by electric telegraph companies, 1015
- limitation of liability of electric telegraph companies, 1015

Carriers by water,

- contracts made abroad, interpretation of, 240

Carriers by water—Continued.

not being common carriers, 938

contracts for the carriage of merchandise, 938

contracts of affreightment, 934

charter-parties, 939

when the contract operates as a demise or bailment of the ship, 940

parties to charter-parties, 941

performance of the terms and conditions of the contract, 942

representations in charter-parties, 943

substantial performance of conditions precedent, 944

time of performance, 945

reasonable time of performance, 946

waiver of time of performance, 947

mode of performance, 948

complete cargo, 948

impossibility of performance, 949

contracts to procure and carry cargoes and merchandise, 949

implied authority of agents of ship charterers, 950

shipment and carriage of merchandise under bills of lading 951

countermand of the shipment, 952

re-delivery of the goods to the consignor, 952

loss of, or damage to, goods by the way, 953

implied promise to carry safely, 954

limitation of liability by special contract, 955

loss by the act of God, dangers and accidents of the seas and navigation, 956

losses occasioned by negligence or misconduct, 957

proof that the loss was by negligence and not by a peril of the sea, 958

loss by fire, 959

limitation of the responsibility of owners of ships by statute, 959

losses occasioned by the negligence of licensed pilots, 960

delivery of goods by shipowners, 961

losses on board lighters conveying goods from the ship to the shore, 962

payment of the freight or hire, 963

calculation of the freight, 964

payment pro rata, 965

time freight, 966

shipowner's lien for the freight, 967

payment of freight by the consignee, 967

liability of freight resulting from the acceptance of goods under bills of lading, 968

Carriers by water—Continued.

- stipulated payments in lieu of freight extinguishing the right of lien, 969
 - retainer of goods in the Queen's warehouse for freight, 970
 - payment of demurrage in charter-parties and bills of lading, 971
 - primage and average, 972
 - general average and contribution, 973
 - damages for breach of charter-parties, 974
 - restrictions on carriage of dangerous goods, 975
- See* COMMON CARRIERS—RAILWAY CARRIERS.

Carriers without reward, 835**Cattle,**

- agistment of, 839

Caveat Emptor,

- doctrine of, when applicable in sales of land, 538
- in sales of chattels, 614, 616, 638

Certificate of approval,

- of work by architect, 859
- corrupt withholding of, 861
- relief against, 860

Certificate of Proprietorship of Shares,

- mortgage of, 1108

Chain-cables,

- illegal sale of, 288

Champerly,

- avoidance of contracts by reason of, 257

Charter-party,

- foreign, interpretation of, 240
- nature and effect of, 939
- parties to sue, and be sued on, 941
- performance of, 942
 - representations in, 943
 - substantial performance of conditions precedent, 944
 - time of, 945
 - waiver of time as a condition precedent, 947
- See* TIME OF PERFORMANCE.
- mode of, 948
- impossibility of, 949
- demurrage under, 971
- damages recoverable for breach of, 974

Charterer,

- liability of, for stores furnished for the use of the vessel, 71
- implied authority of agents of, 950

Chattels. See GOODS AND CHATTELS.**Chemists,**

- sale of medicines by, 293
- right of action for charges, 293

Cheque,

- payment by, 336
- receipt of, by bankers on account of their customers, 819
- payment of, by bankers, 820
 - by one of several joint depositors, 822
 - by one of several joint owners of a sum of money, 822
 - by trustees, 823
- payment of forged, 826
- paid by mistake, 828
- crossed, 830
 - damages recoverable in actions against bankers for non-payment of, 832
- nature and requisites of, 1275
- post-dating of, 1275
- presentment of, 1276
 - effect of keeping an unreasonable time, 1276
 - summary remedy for non-payment of, 1277

Children. See INFANT.

Chose in action,

- contracts founded on, 373
 - assignable bonds, 426
 - assignment of, 429
 - husband's right to wife's, 466
- See BILL OF EXCHANGE—PROMISSORY NOTE.

Churchwardens,

- contracts with, on behalf of the parish, 146

Club Committees,

- contracts with, 142
 - liabilities of the members, 142
 - non-liability of subscribers, 142

See DIRECTORS.

Coals,

- sale of, 283

Cognovit,

- nature and effect of, 1053

Cohabitation,

- liabilities resulting therefrom, 187
- contracts by kept mistresses, 187

Commencement,

- of leases, 683

Commission Agents. See AGENT.

Commissioners of Public Works, &c.,

- contracts with, 143

Commissions in the Army,

- sale of, 266

Committees,

- contracts with, 113, 130
 - of unregistered joint-stock companies, 140, 1342
 - of clubs, 142

See PROVISIONAL COMMITTEES.

Commodatum,

or gratuitous loan, 790-799

See BORROWING.

Common Carrier,

who is to be deemed, 979

nature and extent of the duties of, 979

public profession of railway companies made through the medium of their time-tables, 980

booking names in coaches, 981

implied undertaking of railway companies to forward passengers without unnecessary delay, 982

contracts for the carriage of passengers, 983

limitation of the liability of common carriers by public notice 984

carriage of gold and silver jewellery, title deeds, glass, silk, &c., 985

common carriers' act, 986

declaration of value by consignors, 986

losses from robbery and theft by the common carriers' servants, 987

liabilities of the common carriers' servants, 988

inability to rid themselves by public notice of the duties imposed upon them by the custom of the realm, 989

limitation of the liability of, by special contract, 989

protection of, by special contract from loss by fire and sea risks, 990

stipulations exempting common carriers by water from loss of luggage unless a bill of lading has been signed for, 991

when the carrier may, by special contract, exempt himself from all responsibility for damage to certain classes and descriptions of goods *in transitu*, 992

void limitations of liability, 993

loss of passengers' luggage by railway companies, 994

losses occasioned by the negligence of the consignor, 995

defective packing, 995

inability of railway and canal companies to exempt themselves from responsibility for negligence, 997

declaration of value, 998

special contracts with railway and canal companies for the carriage of goods and chattels, 999

unjust and unreasonable conditions in special contracts for the carriage of chattels by railway or canal, 1000

what are just and reasonable conditions, 1001

liability of a railway company during sea transit, 1002

implied authority of the servants of a railway company to bind the company by special contract, 1003

acceptance of goods to be carried beyond the district travelled over by the carrier to whom they have been delivered, 1004

effect of giving the carrier a wrong direction for the delivery of the goods, 1005

payment of the fare or hire, 1006

carriers' lien, 1006

common carriers' charges, 1007

Common Carriers—Continued.

- railway charges, 1007
- bye-laws, 1007
- carriage of packed parcels, 1008
- charge for luggage by excursion trains, 1009
- notice of action to railway companies, 1010
- parties to be made plaintiffs in actions against carriers for the loss of, or injury to goods, 1011
- joint bailments to common carriers, 1012
- parties to be made defendants, 1013
- carriage of goods and passengers over distinct lines of railway 1013
- damages in actions against common carriers, 1014
- proof of a *jus tertii* by the common carrier, 1016

Common Carriers' Act, 986

Company. See JOINT-STOCK COMPANY.

Compensation,

- in damages for breach of contract, 484, 496
- See DAMAGES.

Competency,

- of parties to contracts, .
- See PARTIES TO CONTRACTS.

Composition Deeds,

- with creditors, 264, 380, 400
- private underhand agreements to secure to one creditor better terms than another, 259, 264
- fraudulent concealment by debtors, 259, 264
- under the bankrupt acts, release by, 264, 369
- See FRAUD — FRAUDULENT PREFERENCE — FRAUDULENT CONCEALMENT.

Compounding Felonies or Misdemeanors,

- contracts for, 258
- See ILLEGAL CONTRACT.

Concealment,

- of agency, 51
- of latent defects in leaseholds, 696
- See FRAUDULENT CONCEALMENT.

Condition,

- words of, amounting to a covenant, 228

Conditional assent,

- admissibility of oral evidence of, 247

Conditional Contract,

- specific performance of, 497

Conditional Liabilities,

- limitation of action for, 407

Conditional Promise of Marriage, 1355

Conditional Release, 367

Conditional Sale, 574, 633

Conditional Tender, 357

Conditions Precedent,

- interpretation of, 232
- distinguished from independent promises, 234
- waiver of, 233
- nature of, 321
- to payment for work and services, 855, 858
- in charter-parties, 944-946,
- in guarantees, 1116, 1125

See PERFORMANCE.

Conditions of sale,

- signature of, by auctioneers, on behalf of vendors and purchasers, 215, 510
- can not be contradicted or altered by the verbal declarations of the auctioneer in the auction-room, 510
- proof of notice of, 510
- effect of misdescription of property in, 520

Confidential agents,

- disabilities of, 313

Consent of parties,

- discharge by, 359

Consideration,

- for the enforcement of a simple contract, 3
 - absence of, 3
 - insufficient, 4, 16
 - bygone transactions, 5
 - failure of, 6, 316
 - written promises without, 7
 - good and valuable, 8
 - work and services, 8
 - consideration of loss, 9
 - services to a third party at the request of the promisor, 10
 - bygone services rendered pursuant to previous request, 11
 - implied request, 12
 - moral obligation, 13
 - suspension, forbearance, or abandonment of legal or equitable rights, 14
 - trust and confidence, 15
 - inadequacy of, 16
 - unilateral promises, 17
 - mutual promises, 18
 - contracts with infants, 19
 - assent of the parties, 20
 - statement of, in guarantees, 1114
 - failure of, in case of bills of exchange, 1251
 - proof of want of, in bills and notes, 1279

Contingent liabilities,

- limitation of actions for, 407

Continuing breaches

- of covenants and agreements, 436
- of real covenants, rights of heirs upon, 441

Continuing guarantees, 858

See GUARANTEE.

Constructive contracts,

nature of, 21

Contract,

definition of, 1

unilateral or bilateral, 1, 17

principal or accessory, 1

by matter of record, 1

by deed, 1

See DEED.

simple, 2

See SIMPLE CONTRACT.

consideration for, 3-16

inadequacy of, 4

mutuality of, 17, 18

with infants, 19, 154

See INFANTS.

with married women. *See* MARRIED WOMEN.

assent of the parties to, 20

authentication of, by deed, 24

by matter of record, 29

by implication of law, 30

See IMPLIED CONTRACTS.

parties to, 32, 194

with agents, 49-90, 909-937

with partners, 93-110

See PARTNERSHIP.

with managers, &c., of projected undertakings, 113, 130, 1338, 1346

See PROVISIONAL COMMITTEES.

with corporations, 115-151

See CORPORATIONS.

with joint-stock companies, 121, 134, 1328

with railway companies, 128, 130, 1330, 1347

See RAILWAY COMPANIES.

authentication of, by signed writing, 200

sale of growing crops, 206, 656

See CROPS.

interpretation of, 220-241

See INTERPRETATION—ORAL EVIDENCE.

illegal, 251-315

See ILLEGAL CONTRACTS.

performance, 318-325

See PERFORMANCE.

payment, 328-358

See PAYMENT.

release, 359-372

See RELEASE.

Contract—Continued.

- accord and satisfaction, 377-387
 See ACCORD AND SATISFACTION.
- discharge by bankruptcy, 397-401
 See BANKRUPTCY.
- limitation of suit, 402-424
 See LIMITATION.
- assignment of, 426-439
 See ASSIGNMENT—NOVATION AND SUBSTITUTION.
- transfer by death, 440-465
 See HEIR-AT-LAW—EXECUTORS AND ADMINISTRATORS.
- transfer by bankruptcy, 470-483
 See BANKRUPTCY.
- remedy for breach of, 484-496
 See DAMAGES.
- enforcement of, 497-506
 See SPECIFIC PERFORMANCE—INJUNCTION.
- for the sale of lands, 507-542
 See SALE OF LANDS.
- sale of goods and chattels, 543-650
 warranties and conditional sales, 574, 611-635
 See SALE OF GOODS AND CHATTELS—WARRANTY.
- sale of incorporeal hereditaments, 652-674
 stocks and shares, 659-673
 See INCORPOREAL HEREDITAMENTS.
- demise of lands, 675-762
 See LANDLORD.
- demise of lodgings, &c., 763-779
 See LANDLORD—LODGING-HOUSE KEEPER—INNKEEPER.
- bailment for hire, 784-789
 See BAILMENT FOR HIRE.
- gratuitous bailment, 790-843
 See BAILMENT WITHOUT REWARD.
- taskwork, 844-881
 See WORK AND SERVICES.
- hiring and service, 882-908
 See HIRING AND SERVICES.
- apprenticeship, 903-908
 See APPRENTICESHIP.
- carriage by water, 938-975
 See CARRIERS BY WATER.
- carriage by land, 976-977
 See CARRIERS BY LAND.
- common carriers, 978-1014
 See COMMON CARRIER.
- mortgage, 1017-1056
 See MORTGAGE.
- hypothecation, 1040-1103
 See HYPOTHECATION.

Contract—Continued.

pledge, 1076-1095

See PLEDGE.

suretyship, 1111-1143

See GUARANTEE.

marine insurance, 1144-1201

See MARINE INSURANCE.

fire insurance, 1202-1219

See FIRE INSURANCE.

life insurance, 1220-1238

See LIFE INSURANCE.

bills of exchange and promissory notes, 1239-1289

See BILL OF EXCHANGE—PROMISSORY NOTE.

of partnership, 1290-1314

See PARTNERSHIP.

of and concerning marriage, 1348-1373

See MARRIAGE—HUSBAND.

Contribution,

between trustees in bankruptcy, 190

between co-sureties, 1139

general average, 1191

See GENERAL AVERAGE.

between partners, 1307

between shareholders, 1321

between members of committees of management, 1340

See CONTRIBUTORIES.

Contributories,

parties liable to be made, 1321

calls on, constituting specialty debts, 1323

limitation of liability of, 1325

release of liability by transfer, 1326

by forfeiture, 1327

transfer of shares, and shifting of the liability to contribute from the transferor to the transferee, 1328

liabilities of husbands, real and personal representatives, heirs at law devisees, and assignees of shareholders, as contributories, 1320

to inchoate railway and parliamentary works' companies, 1347

Convicts,

contracts with, 196

Convoy,

stipulations as to sailing with, in policies of insurance,

Co-Partners,

right of action of, 45

Co-partnership. See PARTNERSHIP.

Copies. See ATTESTED COPIES—CERTIFIED COPIES.

Copyright,

sale of, 657

Corporations,

contracts with, 115-153

Corporations—Continued.

want of mutuality of obligation, 117

implied, 118

with trading corporations, 119

informal contracts where the corporation has had the benefit, 120

contracts with joint-stock companies,

See JOINT-STOCK COMPANIES.

contracts with railway companies,

See RAILWAY COMPANIES.

contracts with companies authorized to sue in the name of their public

officer, 132

liability of the public officer, 132

contracts with mining companies,

See MINING COMPANIES.**Corporeal hereditaments,**

sale of, 508, 542

See SALE OF LANDS.**Costs,**

of previous legal proceedings, when recoverable as damages, 489

Co-sureties. *See* CONTRIBUTION—GUARANTEE.**Counsel,**

authority of, 74

Countermand,

of shipment of goods, 952

County court judgment,

effect of, 394

Covenant,

non-execution by covenantees, 37

in a feigned name, 40

by one person on behalf of another, 41

joint and several, 43

with tenants in common, 44

with joint tenants, 45

by agents, 92

what amounts to, 227

words of proviso and condition, 228

by implication of law, 229, 1400

dependent and independent, 231, 234

mutual, 235

release of, before breach, 362

assignment of, 424

rights of heir upon, 440

rights of executors and administrators upon, 443-450

transfer by death, 447

after an assignment of the term, 450

injunctions to restrain breach of, 503

for title to realty, 535

for quiet enjoyment, 691

to pay rent, 692

Covenant—*Continued.*

- not to let, 693
- to repair, 710
- restricting use of the demised premises, 715
- forfeiture for breach of, 717
- effect of surrender on breach of, 728
- breach of, by equitable assignees, 762
- damages for breach of, 765
 - destruction of buildings by fire or tempest, 767
 - to consume hay or straw on a farm, 768
 - to insure, 1238
- between partners, 1303
- to marry, 1350

Covenants not to sue, 370**Covenants running with the land**,

- privity of estate and privity of contract, 430
- covenants between landlord and tenant, or lessee and reversioner:
 - 432
- covenants real annexed to reversionary estates, 433
- assignees of grantees of a license, 434
- requisites of the covenant, 435
- parties entitled to sue, 436
 - continuing breaches, 436
- implied covenants, 437
- covenants annexed to the estates of joint tenants and tenants in common
 - 438
- assignments of rents and annuities, 439
- rights of the husband to the wife's, 466

Coverture,

- disability of women under, 168
- suspension of, 185
- dissolution of, by death, 186
- See* HUSBAND.

Credit,

- sale of goods on, 584

Creditor,

- payment according to direction of, 330
- debtor, administrator to, 425, 461

Creditors,

- fraud on, 264
- contracts, delaying or hindering, 264
- See* COMPOSITION DEEDS—BANKRUPTCY—FRAUD

Crops and growing produce,

- sale of, 206, 656
- See* BILL OF SALE—AWAY-GOING CROPS.

Cumulative Stipulations, 319**Current coin**,

- payment for work in, 297

Custom and usage,

- impliedly annexed to the express terms of a written contract, 244
- admissibility of oral evidence of, 244
- influence of upon the meaning of words, 245
- in the case of policies of insurance, 1158, 1160

Custom of the country,

- regulating the rights and liabilities of outgoing and ingoing tenants, 753

Damages,

- for breach of contract, 484
 - nominal, 485
 - general, 486
 - special, 486, 488
 - recovery of interest generally, 487
 - costs of previous legal proceedings, 489
 - pecuniary liabilities swelling the amount, 490
- excessive, 491
- penal obligations, 492
 - penalties for breach of contract, 494
 - liquidated damages, 495
 - penalties under denomination of, 496
- breach of contract for the sale of realty, 528
 - non-performance by the purchaser, 528
 - non-performance by the vendor, 529
- breach of covenants for title, 535
- non-performance of a contract for the sale of goods and chattels 588
 - by the purchaser, 588
 - by the vendor, 589
- breach of warranty, 646
 - special damages, 647
 - re-sale with a warranty, 647
 - costs of legal proceedings, 647
- breach of contract to grant a lease, 763
- in action of use and occupation, 764
- breach of covenants for quiet enjoyment, 765
 - of covenant not to assign, 766
 - of covenant to repair, 767
 - destruction by fire or tempest, 767
 - dilapidation by tenants, 768
 - of covenant to consume straw on the farm, 768
- for holding over, 767
- actions for not replacing stock, 799
- non-payment of cheques by bankers, 832
- contracts for performance of work, 881
 - building contracts, 881
 - prevention of performance, 881
 - wrongful dismissal, 897, 907

Damages—Continued.

- refusing to employ, 907
- actions against apprentices, 908
- breach of warranty of authority by agents, 937
- breach of charter-parties, 974
- actions against carriers, 1014
- breach of contracts of indemnity, 1141
 - bankruptcy of the principal debtor, 1141
 - recovery of interest on money paid by sureties, 1143
- breach of contracts of insurance, 1237
 - against railway accidents, 1237
- breach of covenants to insure, 1238
- upon the dishonor of bills, 1283, 1284

Days of grace,

- in fire insurance, 1213
- in life insurance, 1228
- on bills of exchange, 1256
- on promissory notes, 1256

Death,

- discharge of contracts by, 396
- transfer of interest in contracts by, 444, 445
 - See* HEIR-AT-LAW—EXECUTORS AND ADMINISTRATORS.
- civil death, 463
- of one of several joint contractors, 465
- of master and servant, 901
- of principal releasing surety, 1136
- of surety, 1137
- of partners, 1312
- of shareholders in joint-stock companies, 1328
- of a wife, 1389
- of a kusband, 186, 469, 1393

Debenture,

- money borrowed on, 1334

Debtor,

- administrator to creditor, 425, 460

Décree,

- for a divorce, 1387
- for a judicial separation, 183, 1388

Deceit. *See* FRAUD.

Deck Cargoes, 1159 .

See MARINE INSURANCE.

Deed,

- nature of, 23
- authentication by, 24
- requisites of, 25
 - signing, 25
 - sealing and delivery of, 26
 - delivery of, as an escrow 27
- deeds inter partes and deeds poll, 28

Delivery Order,

- transfer of possession of goods through the medium of, 560
- presentment of, for acceptance, 560
- countermand of, before acceptance, 560
 - extinguishment of the right of countermand, 595
 - intervention of the rights of sub-purchasers preventing the exercise of the right to countermand, 597
- shares and undivided quantities sold as such, 596
 - See STOPPAGE IN TRANSITU.*
- assignment of, 1291

Demand,

- of performance, 322
- waiver of, 323

Demise, 675, 690, 1400. *See LANDLORD AND TENANT.*

Demurrage,

- shipowners' right of action for, 971
- interpretation of charter-party as to payment of, 971
- liability for the payment of, under bills of lading, 971

Dependent Covenants and Promises. *See CONDITIONS PRECEDENT.*

Deposit. *See BAILMENT WITHOUT REWARD.*

- money deposited to abide a wager, 304
- recovery of, on sale of lands, 524
- forfeiture of, 525
- in the hands of the auctioneer, 516
- money deposited with one of several partners, 816
- with bankers, 817-823
 - limitation of actions for, 817
- payment of, by subscribers to the capital of projected joint-stock companies, 1339, 1344
- recovery of, on the failure of the undertaking, 1345
 - on the ground of fraudulent misrepresentation or concealment, 1346

Deposit of Title-deeds, 1041. *See HYPOTHECATION.*

Depositaries. *See STAKEHOLDERS.*

Desertion,

- of demised premises by tenants, 697
- of the husband by the wife, 179
- of the wife by the husband, 180

Deviations,

- in building contracts, 870
 - See BUILDING CONTRACTS.*
- in a voyage, 1178

Devisees,

- rights and liabilities of, 443, 447
 - of shareholders in joint-stock companies, 1328

Dilapidations,

- by tenants, 710
 - damages recoverable in respect of, 570, 567

Directors,

- of joint stock companies, contracts with, 130
- of railway companies, contracts with, 131
- fraudulent representations by, 309
- bills and notes by, 128, 1288
- general duties of, 1316
- liabilities of, 1317
- money borrowed by, 1334
- bond and loan notes by, 1335
- See* RAILWAY DIRECTORS.
- of projected undertakings. *See* PROVISIONAL COMMITTEES.

Disabilities,

- of infants, 153-162
- married women, 168-187
- drunkards and lunatics, 191, 192
- aliens, 193, 194
- convicts and outlaws, 196, 197
- sovereigns and ambassadors, 198
- trustees and agents, 313
- temporary, extending the statute of limitations 405

Discharge by Bankruptcy, 397**Discharge of Conditions or Covenants,**

- before breach, 362

Discharge of Servants,

- by order of justices, 891
- of apprentices, 905

Discharge of Contracts,

- before breach, 359, 362
 - by consent, 359
 - by parol, 359
 - of bill of exchange, 364
- by accord and satisfaction, 377
- by acceptance of securities, 379
- by operation of law, 388
- by bankruptcy, 397
- by death, 396
- See* RELEASE—ALTERATION—ACCORD AND SATISFACTION—MER-
GER—JUDGMENT RECOVERED.

Disclaimer,

- by trustee in bankruptcy, 482
- by tenant of landlord's title, 717

Discontinuance of Action,

- a good consideration for a promise, 14

Dishonor,

- notice of, 1257
 - to whom to be given, 1257
 - what amounts to, 1258
 - posting the notice, 1259

Dishonor—Continued.

proof of, 1261

dispensation of, 1262

Dishonored Bills and Notes,

debts secured by, 335

Dismissal

of servants for incompetency, 889

for misconduct, 890

wrongful dismissal, 895

damages for, 897, 907

Dispensation

of conditions precedent, 324

of performance, 359

renunciation, amounting to, 360

Dissolution,

of partnership, 1312

notice of, 111

distribution of partnership chattels and effects, 1313

of joint-stock companies, 1320

of inchoate companies, 1327

See CONTRIBUTORIES.

Distress,

ejectment, where not sufficient, 750

power of, to secure payment of rent-charges, 1050

to secure repayment of money advanced, 1095

Distress for Rent, 704

exemption of goods in public inns from distress for rent, 781

Dividend Warrants,

transfer of, 1274

Dividends,

in bankruptcy, operation of the payment of, 398

Divisible Contracts, 299

Divorce,

effect of decree for, 1387

Dock warrants,

assignment of, 1292

See DELIVERY ORDER.

Documents of title,

pledges of, 1080

See PLEDGE.

Domestic servants,

rights, duties and liabilities of, 882-908

See HIRING AND SERVICE—MASTER AND SERVANT.

Dormant partner,

liability of, 105

distinction between a dormant partner and a secret joint sub-contractor, 106

retirement of, 111

- Double rent and double yearly value,**
for holding over, 743, 744
- Drawer,**
of bill of exchange, liability of, 1252
- Druggists.** *See* CHEMISTS.
- Drunkards,**
contracts with, 191
- Duplicates.** *See* PAWNBROKERS.
- Duration of leases,** 683
- Duress,**
contracts made under, 314
- Earnest and part payment,**
nature and effect of, in contracts of purchase and sale, 564
- Easements.** *See* INCORPOREAL HEREDITAMENTS.
- Ejectment,**
of tenants, 748
under provisoes for re-entry, 749
upon a vacant possession, 751
recovery of possession of houses and small tenements, 752
- Electric Telegraph companies,**
transmission of messages by, 1015
- Emblements,**
tenant's right to, 753
- Employer.** *See* WORK AND SERVICES—MASTER AND SERVANT.
- Encroachments,**
on the waste by tenants, 759
- Enemies,**
contracts with, 194
- Equitable estates,**
and interests, 511
- Equitable liens,** 1041-1047
See HYPOTHECATION.
- Equitable mortgage,**
by deposit of title-deeds, 1041
authentication of the deposit, 1042
extent of the lien, 1044
depositories' right of sale, 1045
priority of equitable mortgages, 1047
of shares and stock, 1110
- Equity of redemption,**
of a mortgagor, 1026
time within which it may be exercised, 1028
accounts to be taken, 1029
See MORTGAGE.
- Erasures,**
in contracts. *See* ALTERATION.
- Escrow,**
delivery of deed as an, 27

Estate agents,

- duties and responsibilities of, 919
- right of, to commission, 930
 - when their authority has been countermanded, 931

Estoppel,

- upon persons covenanting in feigned name, 40
- by deed 248
 - confined to the parties to the contract, 248
- in pais*, 249
- between landlord and tenant, 679

Eviction,

- of purchaser of realty from want of title in the vendor, 533
- loss of the possession of chattels from want of title in the vendor, 643
 - recovery of purchase-money, 643
 - See* TITLE.
- of tenants, 700
 - by railway companies, 701
- of a bailee by title paramount, 795

Evidence,

- inadmissibility of oral evidence to add to, to alter, or contradict a written contract, 242
- oral testimony in aid of insufficient written evidence of a contract. 243
- oral evidence of custom and usage, 243-247
- oral evidence of conditional assent, 247
- discharge of contracts in writing before breach by oral agreement, 359
- oral renunciation of claims on bills, 364
- oral evidence to explain alterations, 390

Excessive damages, 491**Exchange and barter, 507****Excise laws,**

- contracts in contravention of, 260, 290

Executors and administrators,

- contracts with, 164
 - interest of, 165
 - liabilities of, on their own contracts, 166
 - for the acts of each other, 167
 - authentication of promises by, 209
- payment to, 348
- acknowledgment of debts by one of several, 413
- right of action of, 442
 - covenants annexed to estate *pur autre vie* and terms of years, 443
 - covenants annexed to leasehold estates and interest, 444
 - bonds and personal covenants and simple contracts, 445
 - executory contracts, 446
- liabilities of, on covenants for the payment of rent, 448
 - covenants to repair, 449
 - after an assignment of the term, 450

Executors and Administrators—Continued.

- upon personal contracts, 451
- administration of assets, 452
- liability on executory contracts of the deceased, 453
- joint liability of, 167, 454
- executors de son tort*, 455
- feme covert* executrix, 456
- death of, 457
 - continuation of the chain of representation, 457
 - administration *de bonis non*, 458
 - survivorship of liability, 459
- effect of the debtor or creditor of the testator being made his executor, 460
- joint and several contracts, 465
 - survivorship of joint-contractors, 465
- of shareholders in joint-stock companies, liabilities of, 1328

Executor de son tort, 455**Executory accord**, 378**Executory contracts**,

- authentication of, 207, 218
- assignment of, by death, 445, 453
- with bankrupts, 471, 481

Expectant heirs,

- contracts with, 163

Expulsion of tenants, 747**Extortion**,

- money obtained by agents by, 88
- extortionate contracts with expectant heirs, 163
- money obtained by, 1410

Extras,

- to building contracts, 870
- extra work by agents, 926

Factors,

- rights of, on contracts made with them, 76
- sales by, 548
- rights and liabilities of, as between them and their principals, 913
- lien of, 932
- pledges by, 1079-1082
 - factors' acts, 1079-1082
- See* AGENT—PLEDGE.

Factories,

- letting of standing place in, 777

Failure of consideration, 6, 316

- recovery of money paid upon, 634, 643
- for a bill, 1251

False pretences,

- money obtained by agents by, 88
- See* FRAUDULENT MISREPRESENTATION.

Faults,

- sale of realty with all, 539
- of chattels with all, 639
- See FRAUD.*

Fee farm rents,

- limitation of suits for, 402

Felons,

- disabilities of, 464

Feme covert,

- disabilities of, 170
- See HUSBAND.*

Feme covert executrix,

- or administratrix, 456, 1382
- See HUSBAND.*

Feme covert shareholders,

- liability of husbands of, 1329
- See HUSBAND.*

Fences,

- repair of, 714

Figures,

- in contracts, controlled by words, 224

Finding

- of goods, 814

Fire,

- loss or destruction by, when it affords no answer to an action for non-payment of goods bought, 565
- or non-payment of rent, 699
- or non-performance of covenant, 767
- limitation of liability of shipowners for loss by, 959
- loss by, in maritime insurance, 1165

Fire insurance,

- specific performance of contract of, 497
- divers insurances on the same property, 1214
- parties entitled to the benefit of the insurance, 1203
- things covered by the policy, 1204
- warranties, 1205
- alteration of premises increasing the risk, 1206
- notice of alterations, 1207
- misdescription of the insured premises, 1208
- fraudulent concealment of circumstances materially affecting the risk, 1209
- risks covered by the policy, 1210
- fires caused by negligence, 1211
- extraordinary risks, 1212
- notice of loss, 1213
- partial losses, 1212
- forfeiture of the policy, 1213
- non-payment of premium, 1213
- days of grace, 1213

Fire Insurance—Continued.

- insurances by warehousemen and bailees of the goods of their customers, 1215
- liability of the insured to sue when he has sustained no damnification, 1216
- rights of insurer and insured as against wrong-doers causing the loss, 1217
- assignment of fire policies, 1218
- laying out insurance money in rebuilding, 1219
- damages recoverable, 1237
- damages for breach of contract to insure, 1237

Fixtures,

- contracts for the sale of, 650
 - authentication of contracts for the sale of, 208, 651
- title to, 650
 - tenant's right to, on leaving, 753
 - mortgagee's right to, after surrender of lease, 657
 - bankrupt's, 1074
- mortgage of, 1105
 - right to, as between mortgagor and mortgagee, 1106
 - registration of bill of sale of, 1107

Forbearance,

- of legal proceedings a good consideration for a promise, 14
- See* CONSIDERATION.

Forcible entry,

- by landlords for the purpose of ejecting their tenants, 747-752
- licenses to re-enter and eject tenants in case of non-payment of rent, 749

Foreclosure,

- of the right to redeem mortgaged premises, 1032
- See* MORTGAGE.
- things given in pledge, 1087

Foreign contracts,

- made in one country and enforced in another, 238
- bonds, bills, and notes, interpretation of, 239
- foreign purchases, 240
- foreign affreightments, 240
- what determines the locus contractus, 241
- void foreign contracts, 301
- debts contracted abroad by bankrupt, 401
- limitations of actions upon, 424
- protest and noting of foreign bills, 1260

Foreign enemies,

- illegality of contracts with, 194, 274
- unless made pursuant to a license to trade, 274

Foreign friends,

- contracts with, 193

Foreign judgments,

- implied contracts in respect of, 395, 1404
- recovered effect of, 395

Foreign principals,

contracts on behalf of, 81

Foreign sovereign,

privilege of, 198

Foremen,

authority of, 69

Forfeiture,

of deposits, on sale of lands, 525

of lease, 717

waiver of, 720

lessor's right of election, 720

relief against, 721

for breach of covenant to insure or pay rent, 721

assignment after, 722

of pledges, 1086

of policies of fire insurance, 1213

of policies of life insurance, 1228

waiver of, 1230

of shares, 1327

Forged securities,

recovery of money paid for, 316

Forged transfers,

registration of, 672

effect of registration of, 672

Forgery,

of cheques, drafts, and orders, 826

forged indorsements, 827

recovery of money paid for forged bills, notes, or securities, 315, 1411

Fornication,

contracts tending to promote, 252

See ILLEGAL CONTRACTS.

Forwarding agents,

as distinguished from agents for custody, 561, 913

Fraud,

money obtained by agents by, 88

by a partner on his co-partners, 101, 102, 1310

on masters and employers, and persons appointed to offices of trust, 263

fraudulent gifts, trust deeds, and settlements made by debtors, 259, 264

on creditors, 264, 281-386

avoiding a bill of sale or transfer of property, 264, 381

enabling the deceived party to avoid a contract, 305-314

by agents on third parties, 308

by directors of companies, 309

effect of, 511

determination of the power to avoid a contract on the ground of, 312

fraudulent misreading of a deed, 310

constructive fraud, 313

recovery of money obtained by, 316, 529, 533, 535, 539, 611-644, 1410, 1411

fraudulent releases, 368

Fraud—Continued.

- puffers at auctions, 510
- avoiding a contract for the sale of realty, 538
 - for the sale of chattels, 598
- by agents on their principals, 924
- on sureties, 1135
- on marital rights, 1356, 1362
- on parties to the marriage contract, 1362, 1370, 1377, 1378, 1379

See AVOIDANCE.

Frauds by Servants and Agents,

- of banking co-partnerships, 139
- rendering master or principal responsible, 308

Frauds (Statute of),

- contracts relating to sale of lands or interest in lands, 200
 - as affecting leases, 200, 219
 - furnished houses and lodgings, 201
 - sale of a milk-walk, 202
 - agreements to alter and repair buildings, 203
 - services in connection with the transfer of land, 204
 - agreements concerning landmarks, 205
 - agreements for growing crops, grass, timber, &c., 206
- executory contracts for the sale of goods and chattels, 207

See SALE OF CHATTELS.

- fixtures, 208
- shares, 208
- promises by executors and administrators, 209
- promises to answer for the debt, default, or miscarriage of another, 210
- agreements in consideration of marriage, 211
- agreement not to be performed within a year, 212
- unconscientious use made of, 216

Fraudulent Bills of Sale, 253, 381**Fraudulent Concealment,**

- by debtors compounding with creditors, 259, 264
- by agents, 63, 308
- by principal from his own agent, 308
- avoiding contracts, 307
 - for the sale of lands, 538
 - of chattels, 638
- in marine insurance cases, 1156, 1157
- in fire insurance, 1209
- in life insurance, 1224
 - by agents, 1227
- avoiding a treaty of marriage, 1356
 - or contract of betrothment, 1356

Fraudulent Conveyances,

- defrauding subsequent purchasers, 540
- creating fictitious qualifications, 541

Fraudulent Misappropriation,

- by one partner, 816

Fraudulent Misrepresentation,

- by agents, 63
- avoiding contracts, 306
- by directors of joint-stock companies, 309
- on sale of lands, 538
 - of chattels, 636
- by insurers, 1156
- by provisional committeemen, 1346
- in contracts to marry, 1356
- by relatives to bring about a marriage, 1362

Fraudulent Preference,

- by bankrupt, 259, 264, 381-386
 - recovery of money paid by way of, 264
- See* COMPOSITION DEEDS—FRAUD.

Fraudulent Release, 368

Freehold Land Societies.

- contracts with, 151

Freight,

- payment of, under charter-party, 963
 - payment pro rata, 965
- time freight, 966
- shipowners' lien for freight, 967
- payment of freight under bills of lading, 968
- retainer of goods for, by custom-house officers, 970

Freight Policies, 1175, 1186

See MARINE ASSURANCE.

Friendly Societies,

- contracts with, 147
 - loans of money to, 148
- salaries of officers of, 152

Fruit,

- sale of, 206, 656
- See* CROPS.

Funds,

- sale and transfer of stock in the, 673

Furnished Houses and Apartments,

- letting and hiring of, 201, 771-774
 - when infested with bugs and nuisances, 697, 771
 - liabilities of hirers of, 772
 - notice to quit, 775

See LODGING-HOUSE KEEPER—NOTICE TO QUIT.

Furniture,

- letting and hiring of, 784-795

Gambling,

- in the funds, 276

Game,

- sale of, 284

Gaming Contracts, 276

lawful and unlawful games, 278

securities for money won at play or lent for gaming, 279

gaming policies of insurance, 1148, 1222

General and Particular Average,

as used in contracts of insurance, 1191

average and total losses, 1192

General Average and Contribution,

nature of, 1191

liability of the shipowner, and owners of goods shipped on board, for the
payment of, 1191**Goods and Chattels,**

authentication of contracts for the sale of, 207

things passing by the grant of, 1056

mortgage of, 1055

imperfect hypothecation of, 1095

See SALE OF CHATTELS.**Goodwill,**

specific performance of sale of, 497

Government agents,

contracts with, 86

Grace,days of. *See* DAYS OF GRACE.**Grant,**

of incorporeal hereditaments, 652

licenses operating as, 652

words of reservation, 653

right of way, 652, 653, 655

See INCORPOREAL HEREDITAMENTS.

of goods and chattels, 1056

See BILL OF SALE.**Grass,**

authentication of contracts respecting, 206, 656

Gratuitous bailments. See BAILMENT WITHOUT REWARD.**Gratuitous commission. See** BAILMENT WITHOUT REWARD.**Gratuitous promises,**

nature and effect of, 3-4

Gratuitous services, 851**Ground rent,**

payment of, by tenant under threat of distress by the superior landlord 702

recovery thereof by the tenant from his own immediate landlord, 702

Growing crops. See CROPS.**Guarantee,**

original independent contracts in the nature of a guarantee, 211

nature and effect of, 1111

authentication of, 210, 1112

primary and secondary liabilities, 1113

statement of the consideration, 1114

proposals and offers to guarantee not amounting to a concluded contract, 1115

Guarantee—Continued.

- conditions precedent, 1116
 - bonds to secure faithful services, 1117
 - extent and duration of the liability of the surety, 1118
 - release of the surety, 1119
 - discharge of the surety by a change in the service or employment of the principal, 1120
 - bonds and guarantees under seal to partnerships and associations, 1121
 - limitation of the liability of the surety, 1122
 - continuing liabilities, 1123
 - guarantees not importing a continuing liability, 1124
 - conditions precedent to the liability of the surety, 1125
 - duty of the person guaranteed, 1126
 - alteration of the principal obligation discharging the surety, 1127
 - extension of the time of payment, 1128
 - proof of suretyship where the relation does not appear upon the face of the contract, 1129
 - effect of giving time to the principal debtor with reserve of remedies against the surety, 1130
 - release of the principal debt, 1131
 - discharge of the surety, 1131
 - release of the principal obligation, with reserve of remedies against the surety, 1132
 - release of one of several co-sureties, 1133
 - payment by the principal debtor operating as a discharge of the surety, 1134
 - fraud on sureties, 1135
 - discharge of the surety by the death of the principal, 1136
 - death of surety, 1137
 - indemnification of sureties, 1138
 - contribution between co-sureties, 1139
 - assignments of judgments and securities to enable the surety to obtain indemnification, 1140
 - damages for breach of, 1141
 - bankruptcy of principal debtor, 1141
 - recovery of interest on money paid by the surety for the principal, 1142
 - guarantees by one of several partners in the name of the firm, 1143
- Guardians of the poor,**
- contracts with, 146

Hay and straw,

- covenants to consume on farms, 754
- damages recoverable for breach, 768

Health,

- contracts with boards of, 145

Heirs,

- contracts with expectant, 163

Heir-at-law,

- rights of, upon real and personal covenants entered into with the ancestor

Heir-at-law—Continued.

- right of action of, in respect of continuing breaches of real covenants, 441
- upon personal covenants relating to the freehold, and affecting the inheritance, 440
- upon covenants annexed to estate *pur autre vie* and terms of years, 443
- liabilities of, upon covenants running with the land, 444, 447
 - covenants in which he is expressly named, 447
- See* COVENANTS RUNNING WITH THE LAND.
- of shareholder in joint-stock company, liabilities of, 1328

Hereditaments,

- sale of corporeal. *See* SALE OF LANDS.
- sale of incorporeal. *See* INCORPOREAL HEREDITAMENTS.

Highway acts,

- contracts prohibited by, 296

Hiring of chattels, 784-790

See BAILMENT FOR HIRE.

Hiring and service,

- contracts of, 882-908
 - authentication and proof of the contract, 212, 883
 - yearly hirings, 884
 - domestic servants, 884
 - indefeasible and defeasible yearly hirings, 885
 - month's warning or a month's wages, 885, 890
 - hiring by the month and week, 886
 - service at will, 877
 - rights and liabilities of master and servant, 888
- dismissal of skilled servants for incompetency, 889
 - for misconduct, 890
- discharge by order of justices, 891
- notice to leave, 892
 - warning, 892
- payment of wages, 893
- disability from sickness, 894
- wrongful dismissal, 895
 - month's wages in lieu of a month's warning, 896
 - damages for a wrongful dismissal, 897, 907
- dissolution of the contract, 897
 - wages *pro rata*, 897
 - amount of wages recoverable, 898
 - deductions, 898
 - presumption of payment of wages, 899
 - jurisdiction of justices, 900
 - by the death of the parties, 901
- seamen's wages, 902
- contracts of apprenticeship, 903
 - rights and liabilities of parties to indentures of apprenticeship, 904
 - misconduct of the apprentice, 905

Hiring and service—Continued.

- dissolution of the contract, 905
- discharge by award of justices, 906

- damages for wrongful dismissal, 907
- against apprentices, 908

Holding Over,

- by one of two joint tenants, 709
- after the expiration of a lease, effect of, 743

Honorary Services,

- by barristers, &c., 851

Horse Races, 210**Horses,**

- sale of, in market overt, 546, 628

See WARRANTY.

- letting and hiring of, 791, 792

- borrowing and lending of, 791, 792

See BAILMENT WITHOUT REWARD

House Agents,

- duties and responsibilities of, 919
- right of, to commission, 930
- when their authority has been revoked, 931

Houses,

- demise of uninhabitable, 697

Husband,

- right of action upon the wife's contracts, 168
- wife's right by survivorship, 169, 1393
- inability of married women to bind themselves or their husbands by deed, 170
- authority of the wife to sign writings, 171
- loans of money to the wife, 172
- sale of goods to the wife, 173
- proof of the assent to the wife's contracts, 174
- proof of credit given to the wife, so as to exempt the husband from liability, 175
- remedies of creditors against the separate property of the wife, 176
- proof of the marriage, 177
- release from liability upon the wife's contracts after adultery, 178
- desertion by the wife, 179
 - by the husband, 180, 1401
- expulsion of the wife, 181
- liability for necessities during a separation, 182
- effect of a decree for a judicial separation, 183
- orders for the protection of the property and earnings of a deserted wife, 184
- transportation of the husband for a term of years, 185
- dissolution of the coverture by the death of the husband, 186
- liabilities resulting from reputed marriages, 187
- illegality of contract providing for future separation, 254
- right to the wife's choses in action, 466, 1380

Husband—Continued.

- covenants running with the land, 466
- contracts made by the wife before marriage, 468
- rights upon the wife's contracts by statute, 467
- liabilities of the surviving wife, 469
- bankruptcy of, 476
- of female shareholder, liability of, 1329
- wife's equity to a settlement, 1369
- wife's savings, out of her separate allowance, 1380
- gifts to the wife, 1381, 1395
- feme covert* executrix or administratrix, 1382
- release by marriage, 1383
- deeds of separation, 1384
 - subsequent reconciliation, 1385
- wife's right of action in her own name, 1386
 - after separation, 1386
- effect of a decree for a divorce, 1387
 - for a judicial separation, 1388
- dissolution of the coverture by the death of the wife, 1389
 - rights of the husband by survivorship, 1389
 - recovery of money or property belonging to a deceased wife, 1390
 - rights of the surviving husband as administrator to the wife, 1391
 - liabilities of the surviving husband, 1392
- wife's rights by survivorship, 1393
 - unrecovered *choses in action*, 1394
 - gifts to the wife during marriage, 1395
 - paraphernalia, 1396
- liabilities of the surviving wife, 1397
 - indemnification of the wife out of the estate of her deceased husband, 1398
- implied promises by the husband to provide for his wife, 1401

Hypothecation,

- nature and effect of 1019
 - deposit of title-deeds as security for the payment of a debt, 1041
 - authentication of the deposit as a charge on realty, 1042
 - parties entitled to make the deposit, 1043
 - extent of the lien 1044
 - depository's right to have the estate sold, 1045
 - liens on estates for unpaid purchase-money, 1046
 - priority of equitable liens, 1047
 - rent-charges on lands and tenements, 1048
 - registration of rent-charges and annuities, 1049
 - power of distress, entry and sale, 1050
 - extinguishment of rent-charges, 1051
 - registered judgments, 1052
 - warrants of attorney to enter up judgment and cognovits, 1051
 - charges on lands by statute merchant, statute staple, and recognizance, 1054
- imperfect hypothecation of goods and chattels, 1095

Hypothecation—Continued.

- licenses to distrain to secure payment of a debt, 1095
- registration of licenses to seize and sell goods and chattels, 1096
- revocation of the license by act of bankruptcy, 1097
- hypothecation of ships, 71, 1098
- maritime liens, 1099
- bottomry, 1099
- power of hypothecation of the shipmaster, 71, 1100
- lien on vessels causing damage, 1101
- priority of maritime liens, 1102
- hypothecation of cargoes and merchandise, 1103
- equitable mortgage of shares and stock, 1110

Illegal Contracts,

- by registered joint-stock companies, 124
- immoral contracts, 251
 - contracts tending to promote fornication and prostitution, 252
- contracts against public policy, 253
 - contracts providing for the future separation of husband and wife, 254
 - contracts in restraint of marriage, 255, 1348
- maintenance, 256
 - champerty, 257
- contracts obstructing or interfering with the administration of public justice, 258
- contracts in contravention of the policy of an act of parliament or of the bankrupt acts, 259
- contracts for the evasion of the registry, licensing, and excise acts, 260
- parish indemnities, 261
- sale of letters of recommendation and public offices of trust, 262
- contracts in fraud of masters and employers, 263
- fraud on creditors, 264
- contracts made illegal by statutes, 265
 - sale of offices, 266
 - sale of pensions, 267
 - simoniacal contracts, 268
 - resigning and charging benefices, 269
- contracts in restraint of industry and trade, 270
 - trades unions, 271
 - contracts restraining the exercise of a trade or profession in particular localities, 272
- contracts creating monopolies, 273
- contracts with foreign enemies, 274
- stock-jobbing, 275
- gaming contracts and wagers, 276
 - betting-house keepers, 277
- lawful games, 278

Illegal Contracts—Continued.

- notes, bills, and mortgages given to secure money won at, or lent for play, 279
- money knowingly lent for gaming, 280
- usury laws, 281
- sale by illegal weights and measures, 282
- illegal sale of coals, 283
- illegal sale of game, &c., 284
- illegal sale of spirituous liquors, 285
- illegal sale of poison, 286
- illegal sale of petroleum, &c., 287
- chain-cables and anchors, 288
- smuggling, 289
- illegal sale of exciseable articles, 290
- Sunday sales and trading, 291
- contracts for prohibited services, 292
 - unauthorized medical practitioners, 293
 - unlicensed brokers, 294
 - uncertificated solicitors, 295
 - contracts by waywardens, 296
- illegality of contracts for the payment of work otherwise than in current coin, 297
 - the truck system, 297
- divisible contracts, part being good and part bad, 299
- indivisible, illegal, and void contracts, 300
- void foreign contracts, 301
- effect of avoidance, 302
 - money in the hands of depositaries and stakeholders, 304
- avoidance of contracts on the ground of fraud and unfair dealing, 305
 - false representations, 306
 - by directors of companies, 309
 - fraudulent concealment, 307
 - fraud by means of agents, 308
 - effect of fraud, 311
 - constructive fraud, 313
 - determination of the power of avoidance, 312
 - fraudulent misreading of a deed, 313
- duress, 314
- mistake, 315
- recovery of money paid for forged bonds, forged shares, and void securities, 316, 1411
- money received under, 316, 1412
- illegal pledges, 1104
- illegal contracts by railway companies, 1330
- for promoting a marriage, 1348
- illegal marriages, 1376

Imbecility. See LUNATICS.**Immoral Contracts,** 251

See ILLEGAL CONTRACTS.

Implied Contracts,

nature and effect of, 30, 1399

division of, 31

joint interest in implied contracts, 46

liability of agents on, 80-90

See AGENTS.

with partners, 94

with corporations, 118

between vendor and purchaser, 611-627

See WARRANTY.

annexed to contracts for the sale of shares, 665

of carriers by water, 954

resulting from work and service, 1399

implied covenants, 1400

with persons who undertake a gratuitous trust, or to discharge an office of skill, 1401

in respect of things done under a special contract which has been abandoned or rescinded, 1402

of sale, 1403

with respect to foreign judgments, 1404

in respect of money paid, 1405-1408

See MONEY PAID.

money had and received, 1408-1414

See MONEY HAD AND RECEIVED.

account stated, 1415-1418

Implied covenants,

as between landlord and tenant, 236, 1400

annexed to estates or interests in land, 438

Implied promises,

in respect of money paid for another, 1405

Implied requests, 12, 1407

Implied warranty,

by the letters of furnished houses and lodgings, 771

of title by pledgors, 1083

in marine insurance, 1151

See MARINE INSURANCE.

in fire insurance, 1205

See FIRE INSURANCE.

in life insurance, 1223

See LIFE INSURANCE.

Imposition,

money obtained by, 1410

Impossibility,

of performance of contracts, 327

See PERFORMANCE.

Inadequacy

of consideration, 4, 16

of price showing fraudulent transfer, 383

Inclosure,

by tenants, 759

Income tax,

deduction of, from rent, 703

Incoming partners,

liabilities of, 109

Incoming shareholders,

liabilities of, 1328

Incoming tenants. *See* OUTGOING TENANTS.**Incompetency,**

of parties to contracts. *See* PARTIES TO CONTRACTS.

Incorporeal hereditaments, 652

authentication of grants and assignments of, 200-207, 652

sales of, 652

water-courses, 652

licenses of pleasure and profit, 652

licenses irrevocable in equity, 652

reservation of privileges and easements amounting to an express grant, 653

transfer of, 654

right of way, 655

growing grass, 656

copyright, 657

patent right, 658

shares in mining company, 659

shares and letters of allotment, 660

executory contracts for sale of shares, 661, 663

agreements for transfer of shares, 662

mode of performance, 663

time of performance, 664

implied undertakings, 665

payment of calls, 665, 669

rights of scripholders, 666

transfer deeds, 667

transfers in registered companies, 668

registration of transfers, 669

compulsory registration, 670

rectification of register, 671

registration of forged transfers, 672

transfers in public funds, 673

specific performance, 674

Indemnification,

of an agent by his principal, 936

of a surety by his principal, 1138-1140

of railway directors, 1337

of surviving wife, 1398

Indemnity,

parish, legality of, 260

against liability for calls on sale of shares, 665

Independent covenants and promises, 231, 234

Indivisible contracts, 300

Indorsement

of bills of exchange and promissory notes, 1239

transfer by, 1240

restraining the negotiability of the bill or note, 1241

intermediate infirmities of title, 1243

fraudulent indorsements, 1245

indorsement of overdue bills and notes, 1247

liability of indorser, 1251

delivery without, 1263

by agents, 82

by partners, 101

of bill of lading, 1291

of dock warrant, 1292

Industrial and Provident Societies,

contracts with, 149

See FRIENDLY SOCIETIES.

Infant,

consideration in contracts with, 19

rights of, *ex contractu*, 19, 153, 154

infant agents, 59

disabilities of, 153

contracts binding on, 155

for necessities, 156

purchase of estates and shares in companies, 160

ratification of contracts of, 161

authentication of contracts of, 162

marriage settlements by, 1365

Infant agents,

contracts by, 59

Infant purchasers,

of estates, stock, and shares, 160

Injunction,

to compel performance or restrain a breach of contract, 503

of covenants to expend hay and manure, 503

not to let, 503

not to carry on certain trades, 503

to perform duties of directors, 503

positive and negative agreements, 503

agreements to sing, 503

to grant easements, 503

not to build, plant, or inclose, 504

to compel parties to abide by their own statements and representations
505

• waiver of other breaches, 504

acquiescence in act sought to be restrained, 504

in the case of foreign contracts, 506

to restrain contracts ultra vires, 1319

Innkeeper,

- lodgings in common inns, 778
- distinction between a lodging-house keeper and a common innkeeper, 778
- duties of innkeepers, 779
- guests' property exempt from distress, 781
- innkeeper's lien, 782

Insanity. *See* LUNATICS.**Insolvency,**

- of purchasers of chattels before payment of the purchase money, 594-676
- right of the vendor to countermand delivery orders and dock warrants and stop and take back the goods, 594-676
- See* DELIVERY ORDER—STOPPAGE IN TRANSITU.

Insurance, 1144-1238

See MARINE INSURANCE—LIFE INSURANCE—FIRE INSURANCE.

Insurance brokers,

- liabilities of, 915
- lien of, 933
- See* AGENT.

Insurance companies,

- contracts with, 136

Insure,

- breach of covenant to, 1238

Interest,

- payment of, taking a debt out of the operation of the statute of limitations, 416, 420
- by one of several joint debtors and co-contractors, 421
- by and to strangers and agents, 422
- in actions upon contracts, 487
- on money paid by sureties, 1142

Interlineations,

- to correct a mistake, or add a new term to a written contract, 388-392
- See* ALTERATION.

Interpleader,

- between vendors and purchasers claiming deposits in the hands of auctioneers, 526
- between rival claimants to property held by depositaries and stakeholders, 812

Interpretation,

- of contracts, 220
 - evidence of surrounding circumstances, 221
 - latent ambiguity, 222
 - patent ambiguity, 223
 - figures and words at length, 224
 - repugnant and void limitations of liability, 225
 - limitation of liability to a particular fund, 226
 - what words amount to a covenant, 227
 - words of proviso and condition, 228
 - covenants by implication of law, 229

Interpretation—Continued.

- bonds and obligations, 230
- dependent and independent covenants, 231
- conditions precedent, 232
 - waiver of conditions precedent, 233
- independent covenants and promises, 234
- covenants founded on a mutuality of obligation and liability, 235
- implied stipulations, 236
- computation of time, 237
- contracts made in one country and enforced in another, 238
 - foreign bonds, bills, and notes, 239
 - foreign purchases, 240
 - foreign affreightments, 240
 - what determines the locus contractus, 241

See FOREIGN CONTRACTS.

of warranties, 630

See ORAL EVIDENCE.

Investment,

of money by trustees, agents, and friends, 838

I O U,

effect of, 1415

Irresponsible principals,

agents of, 86

Jettison,

of goods to save a vessel from foundering, 973

insurance against, 1165

See GENERAL AVERAGE AND CONTRIBUTION.

Joint agreements and promises, 42**Joint bailments,**

of goods and chattels to bailees, 808

of money to stakeholders, 808

to bankers, 822

to common carriers, 1012

Joint contractors,

rights of, 35

joint and separate rights of action, 42

tenants in common and joint tenants, 44

executors and administrators, 165

husband and wife,

See HUSBAND.

joint assignees of estates with covenants annexed, 438

See PARTIES TO CONTRACTS.

joint interests in implied contracts, 46

liabilities of, 38

joint and several liabilities, 42, 47

of executors and administrators, 166, 167

See PARTIES TO CONTRACTS.

infancy of some of, 163

Joint Contractors—Continued.

rights and liabilities of joint contractors *inter se*, 47, 1405

See CONTRIBUTION.

release of, 365

accord and satisfaction with, 387

acknowledgment by, 410

survivorship of, 465

Joint contracts, 42

joint retainer or employment, 42

joint services, 42

joint and separate interests in deeds, 43

joint and separate interests in implied contracts, 46

joint and several liabilities, 47

joint and several purchases, 48, 1296

purchases in the name of one of several joint adventurers, **not**
creating a partnership, 53, 1296

joint bailments of goods or money, 808

joint account with bankers, 822

with executors, 454

Joint covenants,

actions upon, 42, 47

Joint-stock banking companies,

contracts with, 661

limitation of the liability of shareholders, 1325–1328

See BANKING CO-PARTNERSHIP—CONTRIBUTORIES.

Joint-stock company,

contracts with, 121, 609

requisites of contract with, 122

by agents, 123

in violation of the provisions of the articles of association, 124

effect of the winding-up order, 126

liability of shareholders, 125, 1315

contracts with co-partnerships and associations authorised to sue and be
sued in the name of their secretary, treasurer, or public officer,
132

liabilities of the public officer and of the directors and shareholders,
133

liabilities of the managers and shareholders of mining companies,
134

proof of parties being shareholders, 135

contracts with insurance companies, 136

contracts with banking co-partnerships, 137

established under the 7 Geo. 4, c. 138

liability of banking co-partnerships for frauds by their agents,
139

contracts with committeemen, 140, 141

sale of goods to, 609

transfers of shares in, 668

rectification of register in, 671

Joint-stock Company—Continued.

- loans to, 798
 - bills of sale by, 1064
 - injunction to restrain unauthorised contracts by, 1319
 - bills and notes by the trustees or directors, 1288
 - liabilities of directors, 1317
 - dissolution and winding up, 1320
 - duties of directors, 1316
 - amalgamation of companies, 1318
 - parties liable to be made contributories, 1321
 - fraudulent representations by directors, inducing parties to become shareholders, 1324
 - limitation of the liability of contributories, 1325
 - release from liability to contribute by a transfer of the shares, 1326
 - by forfeiture of shares, 1327
 - extent and duration of the liability of outgoing and incoming shareholders, 1328
 - liabilities of husbands, real and personal representatives, heirs-at-law devisees and assignees, as contributories, 1329
 - of outgoing and incoming shareholders, 1328
 - dissolution of inchoate railway companies, &c., 1347
- See* SHARES—CONTRIBUTORIES.

Joint tenants,

- right of action of, 45
 - on covenants running with the land, 438
- use and occupation by one of several, 709
- holding over, by one joint tenant without the assent of the other 709
- surrender and acceptance of surrender by, 726

Judgments,

- operating as a charge upon realty, 1052
- warrant of attorney to enter up, 1053

Judgment recovered,

- effect of, 394
 - county court judgment, 394
 - foreign and colonial judgments, 395
- when the judgment survives to the wife, 1394

Judicial separation,

- effect of, 183

Jus tertii,

- between landlord and tenant, 677
 - bailor and bailee, 797, 809, 812
 - banker and customer, 823
- principal and agent, 920
- common carrier and consignee, 1016
- pawnor and pawnee, 1092

Justice,

- illegality of contracts obstructing the administration of, 258

Land,

authentication of contracts affecting, 200, 207

Landlord and tenant, 675-783

authentication of leases, 201, 219

interpretation and construction of leases, 227, 242, 245

covenants running with the land, 430

transfer of covenant by death, 447

effect of assignment on covenants, 450

specific performance of agreement to grant a lease, 497

of contracts to renew leases, 497

of contracts to build buildings, 497

leases, 675

agreements for leases, 676

present demises, 677

proof of terms of holding, 678

lease by estoppel, 679

demises by agents, 680

ascertainment and identification of the subject-matter of demise
681

things appurtenant, 682

commencement and duration of, 683

leases from year to year, 683

half-yearly, quarterly, monthly, and weekly hirings, 685

tenancy at will, 686

tenancy by sufferance, 687

leases under powers, 688

demise of tolls, 689

rights and liabilities of lessor and lessee, 690

covenants for quiet enjoyment, 691

for the payment of rent, 692

not to "let, set, or demise," 693

non-execution of the lease by the lessee, 694

non-execution of the lease by the lessor, 695

concealment of latent defects, 696

demises of poisoned herbage, 696

of uninhabitable houses, 697

rooms infested with bugs, 697, 771

payment of rent, 698

exception of damage by fire, 699

extinction and suspension of the rent by eviction, 700

eviction by railway companies under statutory powers, 701

payment of ground rent by the tenant, 702

deduction thereof from the tenant's rent, 702

deduction of income-tax, land-tax, sewers'-rate, and other out-
goings from the rent, 703

distress for rent, 704

extinguishment of the right to distress by an assignment of the **reversion**, 705

apportionment of rent, 706

Landlord and Tenant—Continued.

- action for use and occupation, 707, 764
 - constructive occupation, 708
 - use and occupation by one of several joint tenants, or tenants in common, 709
- covenants and agreements to repair, 710
- injury or damage done to the demised premises, 711
- timber trees, 712
- duty of the tenant to preserve the landlord's landmarks and boundaries, 713
- repair of fences, 714
- restrictive covenants as to user of premises, 715
- defeasible leases, 716
- forfeiture of leases, 716
 - disclaimer and forfeiture, 717
 - proviso for re-entry, 718
 - effect of re-entry on the lessee's liability on his covenants, 719
 - waiver of a forfeiture, 720
 - lessor's right of election, 720
 - relief against forfeiture, 721
 - breach of covenants or conditions respecting insurance or payment of rent, 721
 - assignment after forfeiture, 722
- surrender, 723
 - deeds and agreements of surrender, 723
 - surrenders by act and operation of law, 724
 - substitution of a new tenant in the place of the original tenant, 725
 - surrender and acceptance of surrender by joint tenants, 726
 - non-extinguishment by surrender of derivative estates, 727
 - effect of the surrender on existing breaches of covenant, 729
- notice to quit, when necessary, 729
 - how the notice may be given, and to whom, 730
 - form and effect of the notice, 731
 - alternative and peremptory notices, 731
 - length of the notice, 732
 - time of quitting specified in the notice, 733
 - application of the notice to the current term of hiring, 734
 - commencement of the current year of the tenancy, 735
 - calculation of the current year from one of the usual feast days 736
 - admissions by the tenant of the commencement of the term 737
 - different periods of entry, 738
- service of notice to quit, 739
 - service of notice through the post-office, 740
- acceptance of informal notice, 741
- proof of notice, 741
- waiver of notice to quit, 742

Landlord and Tenant—Continued.

- proof and effect of holding over, 743
 - double yearly value for holding over, 744
 - double rent for holding over, 745
- determination of tenancies by railway notices, 746
- recovery of possession, 747
 - license to eject, 748
 - ejectment under provisoes for re-entry, 749
 - where there is no sufficient distress, 750
 - where the demised premises are deserted, 751
 - of houses and small tenements, 752
- rights of outgoing and incoming tenants, 753
 - away-going crops, allowances for tillage, manure, &c., 753
 - sale of straw off the land, 754
 - removal of superstructures and fixtures, 755
 - abandonment of the right of removal, 756
 - right of purchaser or mortgagee to remove fixtures after surrender, 757
 - non-payment of tithe rent charge by an outgoing tenant, 758
 - inclosure of waste land by tenants, 759
- short form of lease, 759
- leases obtained by misrepresentation, 760
- cancellation of a lease, 761
- equitable assignees, breach of covenants by, 762
- damages for breach of contract to grant a lease, 763
 - in action for use and occupation, 764
 - for breach of covenant for quiet enjoyment, 765
 - to assign, 766
 - to repair, 767
 - destruction of buildings by fire or tempest, 767
 - to consume hay or straw on the farm, 768
 - for holding over, 769
- contracts for the letting and hiring of furnished houses and lodgings
 - 770
 - implied warranties on the part of lessors of furnished apartments
 - 771
 - rights and liabilities of lodging-house keepers and lodgings, 772
 - destruction of buildings by fire, 773
 - proof of the duration of the term of hiring, 774
 - notice to quit, 775
- letting and hiring of stowage and places of deposit, 776
 - room or standing places in factories, 777
- lodgings in common inns, 778
 - who are common innkeepers, 778
 - duties of innkeepers, 779
 - protection of the guest from robbery and theft, 780
 - exemption of the guest's property from distress for rent, 781
 - innkeeper's lien, 782
- gratuitous loans of realty, 783

Landlord and Tenant—Continued.

- tenancy of mortgagor to mortgagee, 1022
- leases by the mortgagor before the mortgage, 1023
- leases by the mortgagor after the mortgage, 1024
- damages for breach of covenant to insure, 1238

Landmarks,

- authentication of agreements concerning, 205
- preservation of by tenants, 713

Land tax,

- deduction of, from rent, 703

Lands,

- sale of interest in, 200

Latent ambiguity, 222**Latent defects**

- in things sold, 612, 616-622

Leasehold estates,

- title to, 516

Leases. *See* LANDLORD AND TENANT.**Lessee and lessor.** *See* LANDLORD AND TENANT.**Letters of allotment,**

- sale of, 660
- See* SHARES.

Letters of recommendation,

- sale of, 262

Letting and hiring,

- of land, 675-783
- See* LANDLORD AND TENANT.

of chattels, 784-799

- implied undertakings on the part of persons letting out ships, horses and carriages, 784-799
- general duties, obligations, and liabilities of the hirer, 785
- See* BAILMENT FOR HIRE.

Lex loci contractus, 240**Lex loci solutionis,** 241**Licenses,**

- to trade with foreign enemies in time of war, 274
- by parol do not release covenants, 361
- assignees of, 434
- of pleasure and profit, 652
- irrevocable, 652
- to landlords to enter and eject tenants for non-performance of covenants 748
- to distrain and sell chattels, 1095
- registration of, 1096
- revocation of, 1097

Licensing acts,

- contracts contravening the policy of, 260
- See* ILLEGAL CONTRACTS.

Lien,

- for the price of goods sold, 592
- of innkeepers, 782
- of bankers, 831
- of workmen and artificers, 572
- of factors and brokers, 932
 - of insurance brokers, 933
- of solicitors, 934
- of ship-masters, 935
- for freight, 967
 - extinguishment of, 969
 - retainer by custom-house officers, 970
- of common carriers, 1006
- of pledges and pawnbrokers, 1018, 1092
- on land from deposits of title deeds, 1041-1047
 - See* EQUITABLE MORTGAGE—HYPOTHECATION.
- of the unpaid vendor of land, 1046
- maritime, 1099
- upon shares and stocks, 1110

Life insurance,

- contracts of, 1220
 - with *de facto* directors, 1221
 - interest of the assured, 1222
 - warranties, 1223
 - conditions, 1223
 - fraudulent misrepresentation and concealment, 1224
 - principal and agent, 1225
 - indisputable policies, 1226
 - risks covered by the policy, 1227
 - forfeiture of policies, 1228
 - non-payment of premium, 1228
 - days of grace, 1228
 - non-inception of the risk, 1229
 - return of premium, 1229
 - waiver of forfeiture, 1230
 - assignment of life policies, 1231
 - right of the party interested in the policy to recover the assurance money, 1232
- appropriation of the funds of life assurance companies, 1233
- winding up of assurance companies, 1234
- novation by policy holders, 375, 1235
- insurance against accidents, 1236
 - railway accidents, 1237
- breach of covenants to insure, 1238
 - damages, 1237

Lighters,

- losses on board of, 962

Limitation of Actions, 402

- statutes of limitation, 402

Limitation of Actions—Continued.

- fee-farm rents and money charged on land, 402
- rent and specialty and simple contract debts, 403
 - what are specialty debts, 404
- exception in favor of persons laboring under temporary disabilities, 405
- commencement of the time of limitation, 406
 - contingent and conditional liabilities, 407
 - unknown and undiscovered breaches of contract, 408
- acknowledgments of deeds and specialties, 409
- acknowledgments of and promises to pay simple contract debts, 410
 - form and requisities of the acknowledgment, 411
 - lost acknowledgments, 412
 - by one of several joint contractors, or by executors or administrators, 413
 - to whom the acknowledgment is to be made, 414
 - exemption of the promise or acknowledgment from stamp duty, 415
- part payment of a principal debt, 416
 - by bill or note, 417
 - by performance of service or by delivery of goods, 418
 - by adjustment and settlement of accounts, 419
- payment of interest, 420
 - by one of several joint debtors or co-contractors, 421
 - by strangers and agents, 422
 - to strangers and agents, 423
- contracts made abroad, 424
- suspension of the statute, 425
- deposits in the hands of bankers, 817

Limitation of Liability,

- repugnant and void limitation of liability 225
- to a particular fund, 226
- of carriers by water, 955, 959
- of common carriers, by public notices, 984
 - by special contract, 989
 - void limitations by common carriers, 995
- of electric telegraph companies, 1015
- of surety, 1122
- of contributories, 1325
- of shareholders in joint-stock companies, 1328

Liquidated Damages,

- penal obligations, 492
- penalties for breach of contract, 494
- liquidated damages, 495
- penalties under the denomination of liquidated damages, 496

Liquidation. See BANKRUPTCY.**Loan,**

- to married women, 172
- for gaming, 280
- gratuitous, 790
 - mutuum* and *commodatum*, 790

Loan—Continued.

- at interest, 789
- to partners, 797
- to joint-stock companies, 798
- to railway directors, 1334, 1335

See BORROWING—BANKERS—BAILMENT.

Loan Societies. *See* FRIENDLY SOCIETIES.**Local Boards of Health,**

- contracts with, 145

Locus Contractus,

- how determined, 241

Locus Pœnitentiæ,

- enabling parties to withdraw from an illegal contract and recover money paid away, 1412

Lodging-House Keeper,

- authentication of contracts with, 201
- letting lodgings for prostitution, 252
- implied promises of, 771
 - that the lodgings are reasonably fit for habitation, 771
- destruction of buildings by fire, 773
- weekly, monthly, quarterly, half-yearly, and yearly hirings, 774
- notices to quit, 775

See NOTICE TO QUIT—LANDLORD AND TENANT.

Long Weight,

- sale by, 282

Loss or Inconvenience,

- a good consideration, 9

Loss of Goods,

- after transfer to purchaser, 565

Loss,

- of title deeds, 519
- of bills and notes, 1282

Luggage,

- loss of, by railway companies, 994
- disguising merchandise as, 994

See COMMON CARRIERS.

Lunatics,

- contracts with, 192

Machinery,

- mortgage of, 1075

Maintenance, 256**Managers,**

- authority of, 69
- of mining companies, liabilities of, 134

See PROVISIONAL COMMITTEES.

Managing Committee. *See* PROVISIONAL COMMITTEES.**Mandamus,**

- to compel registration of parties as shareholders, 670

Mandate,

- or gratuitous commission, 833
 - executory promises to undertake a gratuitous office or trust, 833
 - acceptance of the trust by entering on the employment, 833
 - non-feasance and misfeasance, 834
 - acceptance of goods to be carried, mended or repaired gratuitously, 835
 - acceptance of money for gratuitous investment, 838
 - acceptance of living animals, to be nourished and taken care of, 839
 - perishable commodities to be preserved and kept, 840
 - use by the mandatary, 841
 - theft and negligence by the servants of the mandatary, 842
 - repayment of expenses necessarily incurred by the mandatary in the execution of his commission, 843

Manufacture,

- when a contract to, must be authenticated as a contract of sale, 207
 - or making up of materials, contracts for, 567
 - negligent or unskillful work, 875
 - safe keeping and re-delivery of materials, 879
- See* BAILMENT—WORK AND SERVICES.

Manufacturers,

- duties and responsibilities of, 619

Manure,

- sale of, off the farm, 754

Marital rights,

- fraud on, 1356, 1362

Marine insurance,

- mutual insurance, 1145
- policies of insurance, 1146
 - voyage and time policies, 1147
 - valued and open policies, 1147
- insurable interest, 1148
 - wagering and gaming policies of insurance, 1148
- requisites of the contract, 1149
- matters and things covered by the policy, 1150
- implied warranties, 1151
 - seaworthiness of the vessel, 1151
 - time policies and voyage policies, 1151
 - express warranties, 1152
 - time of sailing, 1153
 - sailing with convoy, 1154
 - neutrality, 1155
- fraudulent misrepresentation, 1156
 - fraudulent concealment, 1157
- risks covered by the policy, 1158
 - custom and usage, 1158, 1160
 - deck cargoes, 1159
 - intermediate voyages, 1160

Marine Insurance—Continued.

- loss by perils of the sea, 1161
 - negligence and misconduct of the master or mariners, 1161
 - sea risks covered by the policy, 1163
- losses from old age and decay and other causes not being perils of the sea, 1164
- perils of fire and jettison, 1165
- loss by capture and seizure, 1166
 - restraints and detainments of kings, princes, and people, 1167
- peril of barratry of the master and crew, 1168
 - perils, losses, and misfortunes generally, 1169
- commencement of the risk, 1170
- duration and termination of the risk, 1171
 - arrival at the port of destination, 1172
 - mooring in safety, 1172
 - risks in landing the goods, 1173
- insurance on profits, 1174
- freight policies, 1175
 - loss of freight, 1176
- insurance on passage money, 1177
- deviation from the voyage insured, 1178
- unreasonable delay, 1179
- insurances on voyages to several ports and places, 1180
 - licenses to touch at different ports and places, 1181
- total loss and abandonment, 1182
 - notice of abandonment, 1183
 - by whom notice of abandonment may be given, 1183
 - form of notice, 1184
 - effect of notice of abandonment, 1185
 - insurance on freight, 1186
 - when the insured may abandon, 1187
 - total losses, 1187
 - capture and re-capture and abandonment, 1188
 - embargo, 1188
 - spes recuperandi, 1188
 - unreasonable abandonment, 1189
- partial loss, 1190
 - exception of partial losses, 1190
- general and particular average, 1191
 - policies warranted free from average, 1191
 - insurance on separate bales or packages, 1192
 - average and total losses, 1192
 - exceptions of general average losses and stranding of the vessel, 1193
- valuation and adjustment of losses, 1195
 - suing and laboring clause, 1194
 - valued and open policies, 1195
 - over-valued policies, 1195
 - calculation of the value, 1195

Marine Insurance—Continued.

- deduction for new materials, 1195
- standard of value and measure of depreciation, 1196
- liabilities of underwriters with reference to the amount of their subscriptions, 1197
- signed adjustments, 1198
- right of the insurer to recover compensation where the loss or damage has been caused by the negligence of a third party, 1199
- non-inception of the risk, 1200
- over-insurance by mistake, 1200
- return of the premium, 1200, 1201
- void policy, 1201

Maritime interest, 1099**Maritime liens, 1099**

See BOTTOMRY.

Market overt,

- definition of, 535
- sale of property and of stolen horses in market overt, 546

Marriage,

- authentication of agreements in consideration of, 211
- contracts in restraint of, 255
- bonds and covenants to marry, 1350
- contracts of betrothment, 1351
 - authentication of the contract, 1352
 - time of performance, 1353
 - excuses for non-performance, 1354
 - conditional promises of marriage, 1355
 - fraudulent concealment of material circumstances, 1356
 - misrepresentation and deceit, 1356
 - transfer of property by the lady after a promise of marriage, 1357
 - accidents and mishaps altering the condition of either of the parties, 1358
- abandonment of the contract, 1359
- breach of promise of marriage, 1360
- damages in, 1360
- promises of portions and settlements, 1361
- fraudulent representations by relations to bring about a marriage, 1362
- ante-nuptial settlements by women engaged to be married, 1363
 - by intended husband and wife, 1364
- marriage settlements by infants, 1365
- settlements of after-acquired property, 1366
- post-nuptial settlements, 1367
 - in fulfillment of an ante-nuptial contract in writing, 1368
 - wife's equity to a post-nuptial settlement, 1369
- contracts in fraud of settlements and promises of marriage portions 1370
- effects of adultery on marriage settlements, 1371
- costs of marriage settlements, 1372

Marriage brokerage,

of female shareholder in joint-stock companies, 1329

release by, 1383

contracts, 1349

Marriage contract,

proof of marriage, 177

reputed marriages, 187

nature and requisites of, 1373

age of consent, 1374

presumption of marriage, 1375

void marriages, 1376

publication of banns and celebration of marriage in a false name, 1377

marriage by license in a false name, 1378

fraudulent celebration of a sham marriage, 1379

See HUSBAND—MARRIAGE.

Marriage settlements. *See* SETTLEMENTS.**Married women.** *See* HUSBAND—WIFE.**Master and servant,**

liabilities of the master on contracts made by the servant as his agent, 68

frauds by servants of banking co-partnership, 139

contracts in fraud of masters, 263

requisites of contracts of hiring and service, 882

authentication of contracts between, 883

yearly hirings—domestic servants, 884

month's warning or month's wages, 885, 896

hiring by month or week, 886

service at will, 887

liabilities of the master, 888

duties of the servant, 888

dismissal for want of skill, 889

for misconduct, 890

discharge by order of justices, 891

warning—notice to leave, 892

payment of wages, 893, 899

disability from sickness, 894

wrongful dismissal, 895, 897

damages for, 897

presumption of payment of wages, 899

jurisdiction of justices, 900

death of the parties, 901

seamen's wages, 902

damages for refusing to employ, 907

implied contracts to pay for services, 1401

contracts of apprenticeship, 903

See APPRENTICESHIP.

See HIRING AND SERVICE—WORK AND SERVICES.

Master of ship. *See* SHIPMASTER.**Measure and value.** *See* BUILDING CONTRACTS.

Medical practitioners,

unauthorised, 293

Memorandum in writing. *See* FRAUDS, STATUTE OF.

Menial servants,

who are, 884

Mercantile customs,

annexation of, to contracts, 244

Mercantile instruments. *See* BILLS OF EXCHANGE—BILLS OF LADING—DOCK WARRANTS—CHEQUES—PROMISSORY NOTES.

Merger,

of simple contracts in deeds and specialties, 393

Mining companies,

contracts with managers and shareholders of, 134

who is a shareholder, 135

sale of shares in, 659

See SHARES.

Mining shares,

title to, 659

sale of, 659

See SHARES.

Misdescription. *See* MISREPRESENTATION.

Misfeance,

by mandataries, 834

Misrepresentation,

by agents, 63

by partners, 104

by directors of companies, 309

amounting to a fraud, in the case of sale of lands, 520

sale of chattels, 611, 632-645

in charter-parties, 943

in marine assurance, 1156

in fire assurance, 1208

in life assurance, 1224

by provisional committeemen, 1346

in contracts of marriage, 1355, 1362

See FRAUDULENT MISREPRESENTATIONS—FRAUDULENT CONCEALMENT.

Mistake,

money paid by, when recoverable, 54, 1406, 1409

payment to agents under, 87

contracts made under, 315

Mistresses,

contracts with, 187

Money Had and Received,

money paid away by agents by mistake, 54

money wrongfully received by agents, 87

for the purchase of property to which the vendor has no title, 533, 635, 643

implied promise to pay over money which ought not, in conscience or equity, to be retained, 1408

Money had and received—Continued.

- over-payments made by mistake, 1408
- recovery of money obtained by oppression, imposition, extortion, deceit, or fraud, 1410
- fees of office wrongfully received by an intruder, 1410
- money received by tenants in common, trustees and agents, 1410, 1413
- money received upon a consideration that has failed, 1412
- money received in exchange for bills, notes, and securities which turn out to be forgeries, 316, 1411
- or under an illegal contract where there is a *locus penitentia* or the parties do not stand in *pari delicto*, 1412
- money received by agents for their principals, 87, 1413
- money received by agents to the use of a stranger, 89, 1413
- receipt of foreign money, 1414

Money lent. See BORROWING—LOAN.**Money orders,**

See BILL OF EXCHANGE—CHEQUE.

Money paid,

- implied promise in respect of, 1405, 1407
- implied request to pay, 1407
- by mistake, 54, 1406, 1409

Monopolies,

- illegality of, 273

See RESTRAINT OF TRADE.

Month's warning or a month's wages, 885, 896**Monthly lettings, 685****Moral obligation,**

- when it will support an express promise, 13

Mortgage.

- given to secure money lost at play, 279
- specific performance of contract to execute, 497
- of realty, 1017
 - nature of the contract, 1017
 - of lands and tenements, 1020
 - rights of the mortgagee when the mortgagor is in occupation of the mortgaged premises, 1021
 - when the mortgagor becomes tenant to the mortgagee, 1022
 - when the mortgaged premises are in the possession and occupation of lessees, 1023
 - leases by the mortgagor after the making of the mortgage, 1024
 - notice of the mortgage to the lessee, 1025
 - equity of redemption of the mortgagor, 1026
 - rights of mortgagees, 1027
 - time within which the right of redemption may be exercised, 1028
 - accounts to be taken, 1029
 - registration, 1030
 - re-conveyance, 1031
 - foreclosure and sale, 1032
 - enlargement of the time for payment, 1033

Mortgage—Continued.

- remedies of the mortgagee, 1034
 - power of sale, 1035
 - tacking of arrears of interest and incumbrances, 1036, 1038
- priority of incumbrances and mortgagees, 1037
 - loss of priority by fraud, 1039
 - decree to settle priorities, 1040
- deposit of title deeds as security for a debt, 1041
 - authentication of the deposit, 1042
 - parties entitled to make the deposit, 1043
 - extent of the lien, 1044
 - depository's rights to have the estate sold, 1045
- lien on estates for unpaid purchase money, 1046
- priority of liens, 1047
- rent charges, 1048–1052
- other charges on lands, 1053, 1054
- of goods and chattels, 1055
 - what things pass by a grant of goods and chattels, 1056
 - bills of sale. *See* **BILLS OF SALE.**
 - registration of mortgages of chattels, 1059
 - void as against creditors, 1072
 - of stock-in-trade constituting an act of bankruptcy, 1073
 - possession and apparent ownership of bankrupt mortgagor, 1062
 - 1074
 - of machinery, 1075
 - of ships and shares of vessels, 71, 1098
 - of fixtures, 1105
 - right to fixtures as between mortgagor and mortgagee, 1106
 - registration of bills of sale of fixtures, 1107
- of stock and shares void by reason of reputed ownership, 1109
 - equitable, 1109
 - lien upon shares and stocks, 1110

See **EQUITABLE MORTGAGE—HYPOTHECATION—PLEDGE.**

Municipal corporations. *See* **CORPORATIONS.****Mutual conditions,**

- what are, 235

Mutual covenants, 235**Mutual promises,** 18**Mutuality,**

- of contract, 18–20, 117
- when necessary to make an executory promise binding and irrevocable, 18
 - not necessary where the executory promise is founded on an executed consideration, 18
 - or in the case of contracts under seal, 23
- of relief to both parties in cases of specific performance, 497

Mutuum,

- or loan for use and consumption, 789

See **BORROWING—LOAN.**

Necessaries,

for infants, 157

See INFANT.

for married women, 182

See HUSBAND—WIFE.**Negative Covenants,**

enforcement of observance of, by injunction, 503

See INJUNCTION.**Negligence,**

of hirer of chattels, 786

of borrower, 791

of lender, 792

of depositary, 802

of depositor, 803

of mandatary, 836

of carriers by water, 957, 958, 960

of carriers by land, 976

of common carrier, 983, 986, 997-1005

of consignor, 995

Negotiable Contracts. *See* BILLS OF EXCHANGE—PROMISSORY NOTE.**Neutrality,**

stipulation of, in policies of marine assurance, 1155

Nominal Damages,

recovery of, 485

See DAMAGES.**Nominal Partners,**

right of action of, 94

liabilities of, 107

Non-acceptance,

of goods sold, 581

excuses for non-acceptance, 581

Non-delivery,

of goods sold, excuses for, 580

Non-feasance,

by mandataries, 834

Non-payment,

of price of goods sold, action for, 582

Note. *See* PROMISSORY NOTE.**Notice of Dishonor,**

to whom to be given, 1257

what amounts to, 1258

posting of, 1259

proof of, 1261

dispensation of, 1262

Notice to Quit,

when necessary, 729

how and by whom to be given, 730

form and effect of, 731

length and duration of, 732-737

Notice to Quit—Continued.

- where there are different periods of entry, 738
- service of, 739, 740
- acceptance of informal notice, 741
- proof of notice, 743
- waiver of the notice, 742
- railway notices, 746
- in the case of demises of lodgings and furnished apartments, 772

Notice of Assignment, 428

Noting,

- of foreign bills, 1260

Novation and Substitution,

- nature and effect of, 372
 - substitution of a new contract in place of the original contract, 373
 - release by, 373
- drafts and orders for the payment of money operating by way of novation and substitution, 374
- novation in the case of life assurance companies, 375
- substituted performance of something different, 376

Nudum Pactum,

- nature and definition of, 3-12

Obligation,

- moral, 13
- mutuality of, 18

Offers,

- of a reward, 10
- of sale, 20
- acceptance of, 21
 - through the post, 22
 - by telegram, 22
- to pay not amounting to tender, 356
- of a guarantee, 1115
- of marriage, 1351

See PROMISE OF MARRIAGE.

Offices,

- sale of, 266

See ILLEGAL CONTRACTS.

Oppression,

- money obtained by, 1410

Oral Contracts,

- for the sale of land, enforcement of, 438

Oral Evidence,

- of agency, 52
- inadmissibility of, to add to, alter, or contradict a written contract, 242
- proof of contracts by, 243
- of agricultural and mercantile customs, 244
- customary meaning of particular words, 245
- terms of art, 246

Oral Evidence—Continued.

- trade acceptations, 246
- of conditional assent, 247
- estoppel by deed, 248
- of estoppels *in pais*, 249
- contradictable averments in written contracts not under seal, 250
- of renunciation of claims on bills or notes, 364

Order and disposition, 383**Orders,**

- in favor of creditors, 373, 374

See MONEY ORDERS.

Orders for the protection of deserted wives, 184**Order of discharge,**

- in bankruptcy, 397

Outgoing shareholders,

- liabilities of, 1326, 1328

See SHARES.

Outgoing tenant,

- rights of, 753
 - away-going crops, tillages, manures, &c., 753
 - sale of straw off the land, 754
 - removal of fixtures, 755
- non-payment of tithe rent charge by, 758

Outlaws,

- disabilities of, 197, 463

Overseers,

- contracts with, 146

See PARISH OFFICERS.

Ownership,

- transfer of, in the case of a contract for the sale of land, 512
- of chattels, 565

Packed parcels,

- carriage of, 1008

Paraphernalia,

- right of the wife to, 1396

Parent,

- liability of for medical advice and medicines ordered for his children by servant, 68
- for wearing apparel and goods delivered at his residence by order of his children, 156
- consent of, to the marriage of minors, 1373

Parish indemnities,

- legality of, 261

Parish officers,

- authority of, 146
- contracts with, 146
 - liabilities of, upon contracts entered into by them on behalf of the parish, 146

Parish Officers—*Continued.*

contribution between churchwardens who concur in giving orders, 146
actions by, 146

Parol discharge,

of contracts before breach, 359

Parol evidence. *See* ORAL EVIDENCE.**Parol license,**

no discharge of covenant, 360
when pleadable by way of equitable defense, 362

Part acceptance,

and receipt of things sold, 206, 207, 558, 559

Partial loss,

exception of, in policies of marine assurance, 1190

Parties to contracts,

parties entitled to enforce simple contracts, 32
strangers to the contract, 33
contracts with bankers, warehousemen, and wharfingers, 34

parties entitled to enforce contracts under seal, 35

trustee and *cestui que trust*, 36

covenantees not executing, 37

parties liable upon simple contracts, 38

parties liable upon deeds, 39

covenants in feigned names, 40

by one person on behalf of another, 41

joint and several agreements and promises, 42

joint and separate interests in deeds, 43

tenants in common, 44

joint tenants, 45

joint and separate interests in implied contracts, 46

joint and several liabilities, 47

purchases, 48

with agents. *See* AGENT.

with partners. *See* PARTNERSHIP.

with corporations. *See* CORPORATIONS.

with co-partnerships and associations suing by public officer, 132

with insurance companies. *See* INSURANCE COMPANIES.

officers of friendly societies, 152

loan societies, 152

trades unions, 152

infants, 153. *See* INFANTS.

expectant heirs, extortionate contracts with, 163

executors. *See* EXECUTORS, 164

husband and wife. *See* HUSBAND.

bankrupt. *See* BANKRUPTCY.

drunkards, 191

lunatics, 192

alien friends, 193

alien enemies, 194

prisoners of war, 195

Parties to Contracts—Continued.

convicts, 196

outlaws, 197

parties privileged from actions and suits, 198

Partition of lands,

specific performance of agreement for, 497

Partnership,as between partners *inter se*, 1293–1314

participation in profits constituting a partnership, 1293

participation in profits not constituting a partnership, 1294

payment of interest out of profits, 1295

joint purchases of goods, 1296

tenancy in common of chattels not constituting a partnership, 1297

conditions precedent to the formation of a partnership, 1298

partnership in profits but not in the capital stock, 1300

introduction of new partners, 1301

contracts between the firm and one of the partners, 1302

contracts between partners individually in their own names, 1303

distribution of the profits of co-partnerships, 1304

action by one partner against another for a balance found to be due
on a settlement of accounts, 1305

action for a share of the profit of a particular joint adventure, 1306

contribution between partners to the common loss, 1307

particular transactions not connected with the general account of
profit and loss, 1308

purchases by one partner on behalf of the firm, 1309

fraudulent use of the co-partnership name, 1310

contracts of partnership induced by fraud, 1311

dissolution of partnership, 1312

distribution of the partnership property and effects, 1313

use of the name of the firm after dissolution, 1314

as regards the public and third parties, 93

implied contracts with and promises by firms, 94

trust services by partners, 95

contracts with trustess or directors of co-partnerships, 96

nominal and dormant partners, 105

liabilities of partners upon deeds, 114

liabilities of partners upon simple contracts, 97

who may be made liable as partners, 98

inchoate and incomplete partnerships, 99

restrictions upon the apparent general authority of one partner to
bind another, 100

dealings by one partner in fraud of the co-partnership, 101

authority of one partner to sign bills of exchange and promissory
notes so as to bind the firm, 102

transactions out of the ordinary course of business, 102

bills, notes, and guarantees in the name of the firm given by one
of the partners to secure his own debt, 103

representations and acknowledgments by partners, 104

Partnership—Continued.

- liabilities of dormant and secret partners, 105
 - private agreements between parties exempting dormant partners from liability, 106
- liabilities of nominal partners, 107
 - persons suffering themselves to be held out to the world as partners, 108
- liabilities of incoming and retiring partners, 109
 - notice of retirement of partners, and of the dissolution of the co-partnership, 110
 - retirement of dormant partners, 111
- authority of committee men, 113
- payment to one partner, 347
- bankruptcy of one partner, 477
- specific performance of contract of, 497
- parties secretly interested in the subsequent disposition of goods purchased by one of them, 607
 - sub-purchasers of separate shares of goods sold, 608
- loans of money to one of several partners, 797
- deposit of money with one of several partners, 816
- sale of goods to one of several partners, 606
- dealings by one partner in fraud of the firm, 606
- deposit of money with one of several partners, 816
- bonds and guarantees by sureties to, 1121
- guarantees by one of several partners in the name of the co-partnership, 1143
- bills of exchange and promissory notes by partners, 1187
- See* MINING COMPANIES—BANKING CO-PARTNERSHIP—JOINT-STOCK COMPANY—CORPORATIONS.

Part Payment,

- of a principal debt preventing the operation of the statute of limitations, 416
 - by bill or note, 417
 - by render of service, or by delivery of goods, 418
 - by adjustment and settlement of accounts, 419
 - by one of several joint debtors or co-contractors, 421 *
 - by strangers and agents, 422
 - to strangers and agents, 423
- See* INTEREST.

for goods sold, effect of, 564

Part Performance,

- of contracts for the sale of land, 511
- See* PERFORMANCE.

Passengers,

- by coach or rail, injuries to, 976
- to be forwarded without delay, 982
- contracts for the carriage of, 983
- luggage, 994
 - by excursion trains, 1009

Passengers—Continued.

- carriage over other railways, 1013
- damages for railway accidents, 1237

Patent Ambiguity, 223**Patent Defects,**

- in things sold, 638

Patent Rights,

- sale of, 658
- specific performance of contract for, 497

Pawnbrokers,

- who are, 1092
- pledges with, 1092
 - forfeiture and sale of pledges, 1093
 - warranties on sales of unredeemed pledges, 1094
 - no implied warranty of title, 1095

Payment,

- to agents by mistake, 87
- and acceptance of part of an admitted simple contract debt, 328
- and acceptance before action of the full amount of an admitted simple contract debt, 329
- according to the direction of the creditor, 330
- to a person found in a merchant's counting-house, 331
- by bill or note, 333
 - acceptance of renewed bills, 334
 - dishonored bills 335
- by cheque, 336
- by a stranger, 338
- with a stolen bank note, 337
- proof of, 339
 - presumption of, 340
- through agents, 342, 346
- receipt, 341
- to a creditor of the creditor, 345
- by a principal to his own agent, 346
- to one of several partners, 347
- to trustees, executors, &c., 348
- to a bankrupt, 349
- appropriation of, 350
 - by the debtor, 351
 - by the creditor, 352
- separate accounts and one entire running account, 353
- avoidance of payment, 354
- tender of, 355
 - offers not amounting to a tender, 356
 - conditional tenders, 357
- apportionment of periodical payments, 358
- part payment extending the period of limitation, 416
- effect of part payment in executory contracts for the sale of goods, 554
- of cheques by bankers, 820

Payment—Continued.

of cheques by mistake, 821

of wages, 893

presumption of, 899

by one agent to another agent of the same principal, 922

Payment by bill, note, or cheque, 333

acceptance of renewed bills, 334

Payment into court,

of purchase-money on sale of land, 531

Pecuniary liabilities,

a head of damages, 490

Penal obligations, 492*See* BONDS.**Penalties,**

penal obligations, 492

for breach of contract, 494

penalties for non-performance of covenants and agreements, 494

liquidated damages, 495

penalties under the denomination of liquidated damages, 495

for non-performance of building contracts, 867

Pensions,

illegal sale of, 267

Performance,

of contracts, 318

mode of performance, 318

cumulative and alternative stipulations, 319

time of performance, 320

See TIME OF PERFORMANCE.

conditions precedent to performance, 321

demand of performance, when necessary, 322

waiver of demand of performance, 323

dispensation of performance of, 324

tender of performance, 325

prevention of performance, 326

impossibility of performance, 327

substitution of performance. *See* ACCORD AND SATISFACTION.performance by payment. *See* PAYMENT.

waiver of, amounting to a release, 359

substituted performance of something different. 376

specific. *See* SPECIFIC PERFORMANCE.

injunction to compel, 503

of contracts for the sale of land, 521

of sales of shares, 662

See SPECIFIC PERFORMANCE—INJUNCTION.

of contracts for work and services, 853

of building contracts, 866

security for, 867

prevention of, 871, 881

of charter-parties, 942

III—39

Performance—Continued.

- of conditions precedent in, 944
- mode of performance of, 948
- impossibility of performance of, 949

Perils of the sea,

- what are, as between consignor and carrier, 956
- in insurance cases, 1161

Perishable commodities,

- bailments of, 840

Personal representatives. See EXECUTORS.**Personal contracts,**

- assignment of, 426
- liability of executors upon, 451

Personal covenants,

- transfer of, by death, 446

Petroleum,

- illegal sale of, 287

Physic,

- unlawful practising of, 293

Physicians,

- qualification of, 293
- services by, 851

Pilot,

- losses occasioned by the incapacity of, 960

Plaintiffs. See PARTIES TO ACTIONS.

- accord and satisfaction with one of several joint-plaintiffs, 387

Play. See GAMING.**Pledge,**

- contracts of, 1018, 1076
- things which may be given in pledge, 1077
- parties entitled to pledge, 1078
 - factors and agents entrusted with goods, or documentary evidence of title to goods, 1079
 - what are documents of title, 1080
 - when documents of title may be said to be entrusted to a factor or agent, 1081
 - what are advances and loans upon deposit within the factors acts, 1082
- implied warranty of title on the part of the pledgor, 1083
- right of redemption, 1084
- sale of the pledgor's right of property and right of redemption, 1085
- forfeiture of the pledge, 1086
- foreclosure of the right of redemption, 1087
- pledgee's power of sale, 1087
- accounts between pledgor and pledgee, 1088
- custody and safe keeping of the pledge, 1089
- use of things pledged, 1090
- statutory rights and liabilities of pawnbrokers, 1091
 - who are to be deemed pawnbrokers, 1092

Pledge—Continued.

- sale of things pawned, 1093
- warranties on sales of unredeemed pledges, 1094
- illegal pledges, 1104
- pledges of title-deeds, 1041

Poison,

- illegal sale of, 285

Poisoned herbage,

- demise of, 696

Policy brokers,

- right of, on contracts made by them as agents, 76
 See AGENT.
- liability of, 915
- right to commission, 928
- lien of, 932

Policies,

- assignment of, 426
- of marine insurance, 1146
 - voyage and time, 1147
 - valued and open, 1147*See MARINE INSURANCE.*
- against fire, assignment of, 1218
 See FIRE INSURANCE.
- upon life, assignment of, 426, 1231
 - forfeiture of, 1228
 See LIFE ASSURANCE.
 - See ACCIDENT.*

Poor law guardians,

- contracts with, 146

Portions,

- promises of, 1361
 - authentication of, 211, 1361
 - contracts in fraud of, 1370

Possession,

- transfer of, to creditor by bankrupt, 384

Post,

- acceptance of offers made by, 22
- notice to quit through the, 740

Post-nuptial settlements,

- validity of, 1367
- in pursuance of an ante-nuptial contract, 1363
- valid consideration for, 1368

Power of attorney,

- to execute deeds, 909
- revocation of, 910

Power of granting leases, 688

Power of revocation,

- and defeasance of contracts, 361

- Power of sale,**
of mortgaged lands, 1035
 See MORTGAGE.
of pledges, 1087
 See PLEDGE.
- Precedent conditions.** *See* CONDITIONS PRECEDENT.
- Presentation,**
sale of, 266
- Presentment,**
for payment, 1254
of bills of exchange for acceptance, 1248
of bills payable at or after sight, 1248
- Presumption,**
of marriage, 1375
of payment, 340
 of payment of wages, 899
- Pretenced titles,**
sale of, by parties out of possession, 537
- Prevention of performance.** *See* PERFORMANCE.
of contracts, 326
 of building contracts, 871, 881
- Previous legal proceedings,**
costs of, as damages, 489
- Price,**
reduction and abatement of, 591, 865
inadequacy of, in fraudulent transfer, 383
- Primage and average,** 972
- Principal and agent.** *See* AGENT—MONEY PAID.
- Principal and surety.** *See* GUARANTEE.
- Printers,**
contracts with, for the publication of immoral or libellous books, 292
- Priority,**
of mortgages, 1037
 See MORTGAGE.
of maritime liens, 1099
 See BOTTOMRY.
- Prisoners of war,**
contracts with, 195
- Privity of contract,**
in deeds, 35
 essential to the maintenance of an action upon a deed *inter parties*,
 37
in covenants running with the land, 430
privity of estate, 431
 See PARTIES TO ACTIONS.
- Privity of estate,**
enabling assignees of estates to maintain actions on covenants running
with the land, 430
 See COVENANTS RUNNING WITH THE LAND.

Procuration. *See* POWER OF ATTORNEY

Professional services,

liabilities of professional men for negligence and want of skill, 875

Profits,

insurance on, 1174

Projected companies,

contracts with, 113, 129, 1338

allotment of shares in, 1343

dissolution of, 1347

See PROVISIONAL COMMITTEES.

Projectors,

of companies, services by, 129

contracts for the payment of, 131

Promise. *See* CONSIDERATION.

without consideration, 2, 6

unilateral undertakings, 17

revocation of, 17, 20, 361

by death, 446

mutual promises, 18

acceptance of, 20

by an executor to answer damages out of his own estate, 209

to answer for the debt, default, or miscarriage of another, 210

in consideration of marriage, 211

See PORTIONS.

not to be performed within a year, authentication of, 212

without consideration, authentication of, 218

to pay debts barred by the statute of limitation, 409

See ACKNOWLEDGMENT OF DEBTS.

by implication of law, 1400

Promise of marriage,

authentication of, 1352

time of performance, 1353

excuses for non-performance, 1354

conditional promises, 1355

avoidance and dispensation of, 1356

discharge of the promise, by the secret disposal of property by the lady,
1357

by alteration in the condition of the parties, 1358

damages for breach of, 1360

Promises of portions and settlements,

authentication of, 211, 1361

enforcement of, 1361

contracts in fraud of, 1370

Promissory note,

right of action on promissory notes payable to one man "for the use" or
"on behalf" of another, 75

foreign, interpretation of 239

given to secure money lost at or lent for play, 279

payment of wager by, 279

Promissory note—Continued.

- payment by, 333
- oral renunciation and discharge of, 364
- assignment of, 1240
 - transfer by endorsement, 1240
 - See* INDORSEMENT,
 - transfer by delivery, 1268
 - See* BILL OF EXCHANGE.
- liabilities of makers and indorsers, 1269
- indorsement of, when overdue, 1270
- payable at a particular place, 1271
- days of grace, 1272
- notes for the payment of small sums, 1273
- summary remedy for non-payment of, 1277
- cancellation of, 1278
- avoidance of, as between the immediate parties, by proof of want of consideration, 1279
- alteration of, 1280
 - See* ALTERATION.
- loss of, 1282
- liability of agents on, 1285
- liability of partners on, 1287
- by joint stock companies, 1289
- damages in actions upon, 1283, 1284

Promoters,

- of companies, contracts with, 1338
- services by, 1338
- contracts for the payment of, 1339
 - See* PROVISIONAL COMMITTEES.

Proposals,

See OFFERS.

Prospective damages. *See* DAMAGES.**Prostitution,**

- wages of, not recoverable, 252
- contracts in furtherance of, 252
 - letting of lodgings and sale of clothes for purposes of prostitution, 252

Protest,

- of foreign bill, 1260

Provisional Committees,

- contracts with, 113, 120, 1338
- liabilities of, to third parties, 140
- powers and responsibilities, 141
- contracts for the payment of the projector out of the deposits 1339
- contribution between members of, 1340
- rendering of accounts and appropriation of the funds, 1341
- contracts of, with the subscribers and shareholders, 1342
- allotment of shares, 1343
- payment of subscriptions and deposits, 1344

Provisional Committees—Continued.

- recovery of deposits on the abandonment of the undertaking, 1345
- misrepresentation by managers of, 1346
- dissolution of inchoate railway and parliamentary works companies,
1347
- contributories, 1347

Provisional Directors. *See* PROVISIONAL COMMITTEE.

Provisions,

- implied warranties on sale of, 621

Proviso,

- words of, amounting to an express covenant, 228

Public Justice,

- illegality of contracts obstructing, 258

Public Offices,

- illegal sale of, 262, 266

Public Officer Co-partnerships,

- contracts with co-partnerships authorized to sue and be sued in the name
of their secretary, treasurer, or public officer, 132
- rights and liabilities of the public officer, directors, and shareholders,
133

See DIRECTORS—JOINT-STOCK COMPANY.

Public Officers,

- contracts by, 83
- notoriously agents, 83
- salaries of, 144

Public Policy,

- contracts in contravention of, 253
- See* ILLEGAL CONTRACTS.

Public Inconvenience,

- no ground for refusing specific performance, 497

Public Works,

- contracts with trustees of, 143

Puffers,

- secret employment of, to run up the price of things sold by auction, 510

Purchaser. *See* SALE OF LANDS.

Quacks,

- liabilities of, 293, 876

Quantum Meruit,

- right to recover by way of, 1403

Quiet Enjoyment,

- covenants for, as between landlord and tenant, 691
- damages for breach of, 765

Races,

- horse and foot, 278

Railway and Canal Traffic Act, 999

Railway Carriers,

- implied undertakings by, to forward passengers, 982
- limitation of liability of, by public notice, 934
 - by special contract, 989
 - special contracts with railway and canal companies, 999
 - unjust and unreasonable conditions, 1000
 - authority of railway servants to bind the company by special contract, 1003
 - liability during sea transit, 1002
- entire and indivisible contracts to carry over several lines of railway, 1004
- railway charges, 1007
- by-laws, 1007
- carriage of packed parcels, 1008
- charge for luggage by excursion trains, 1009
 - effect of disguising merchandise as luggage, 994
- notice of action against railway companies, 1010
- parties to be made plaintiffs and defendants, 1011, 1013

See COMMON CARRIERS.

Railway Companies,

- contracts with, 128, 131
- contracts with the promoters of a railway made before incorporation, 129
- bills of exchange by, 128
- informal contracts for services, 131
- contracts with directors and committees of directors, 130
- transfer of shares, 660
 - liabilities of outgoing and incoming shareholders, 1326, 1328
- See* SHARES.
- contracts for purposes not sanctioned by their acts of incorporation, 1330
- powers of directors, 1331
- application to parliament for an extension of the powers of the company 1332
- void contracts by chairman, 1333
- money borrowed by directors on railway debentures, 1334
- bonds and loan notes by directors, 1335
- indemnification of directors, 1337
- dissolution of inchoate, 1347

Railway Debenture, 1334**Railway Directors,**

- bills of exchange by, 128
- authority of, 1331
- contracts by, in which they are personally interested, 130, 1336
- loans to, on debenture, 1334
- bonds and loan-notes by, 1334
- exemption of, from personal liability, 1337
- indemnification of, 1337

Railway notices,

- determining tenancies, 746

Rates,

- deduction of, from rent, 702, 703

Ratification,

- f the acts of agents, 60
- by the husband of the wife's contracts, 174
- f contracts made during infancy, 161
- authentication of, 162

Realty. *See* SALE OF LANDS.

- title to. *See* TITLE.

Receipt,

- effect of receipt in full as payment, 341
- by agents on account of their principals,
- by sub-agents, 921

Receivers,

- of stolen property, sale by, 546

Recitals,

- in deeds, contradiction of, 248
- amounting to covenants, 227, 534

Recognizance,

- charging lands, 1052

Re-conveyance,

- to mortgagor, 1031
- See* MORTGAGE.

Record,

- contracts by, 29

Recovery,

- of money, paid under illegal or void contracts, 316, 1411
- on a void sale of realty, 533, 534-539
- of chattels, 611, 632-646
- See* MONEY PAID—MONEY HAD AND RECEIVED.
- of possession. *See* LANDLORD—EJECTMENT.

Redemption. *See* MORTGAGE—PLEDGE.

Redhibition,

- or return of things sold, and recovery of the price by reason of redhibitory defects, 611-632

Redhibitory defects,

- in things sold enabling the purchaser to annul the sale, 611-632

Re-entry,

- provisoes for, in leases, 718
- effect of on lessees' covenant, 719
- ejectment under provisos for, 749
- where there is no sufficient distress, 750
- See* EJECTMENT.

Registered Joint-Stock Companies. *See* JOINT-STOCK COMPANY.

Registration,

- of bills of sale of ships, 649, 1098
- of fixtures, 651
- of transfers of shares, 669
- compulsory registration by madamus, 670
- orders for the rectification of the register 671
- registration of forged transfers, 672

Registration—Continued.

- of mortgages of lands, 1090
- of goods and chattels, 1059, 1060, 1069
 - See* GOODS AND CHATTELS.
 - evasion of, 1071
 - of assignments of bills of sale, 1068
 - of agreements for bills of sale, 1069
 - effect of registration of bills of sale, 1067
- of licenses to distrain, 1095, 1096

Registration acts,

- illegality of contracts in evasion of, 260

Registry,

- of shareholders. *See* REGISTRATION.

Release,

- covenants and agreements to refer disputes and differences to arbitration, 258
- of contracts, 359
 - dispensation of performance, 359
 - of simple contracts before breach, 359
 - renunciation of a contract by one party amounting to a dispensation
 - of performance to another party, 360
- powers of revocation and defeasance of contracts, 361
- of causes of action *ex contractu*, 363
 - oral renunciation of claims on bills and notes, 364
- of one of several joint contractors, 365
- general, 366
- conditional, 367
- fraudulent, 368
- by composition deed under the Bankruptcy Acts, 369
- covenants not to sue, &c. *See* COVENANTS.
- substitution of a new contract, 373
- by novation and substitution, 372
 - See* NOVATION.
- by alteration, 388
 - alteration of contracts in writing, 388
 - immaterial alterations, 389
 - evidence to explain alterations, 390
- cancellation of contracts, 391
- merger of a single contract in a contract under seal, 393
- judgment recovered, 394
 - county court judgments, 394
 - foreign and colonial judgments, 395, 1404
- debtors made executors, 460
 - appointment of a debtor as administrator, 461
- appointment of a creditor as executor, 462
- of surety, 1119, 1127, 1130
 - of principal debtor with reserve of remedies against the surety, 1130, 1132
 - of one of several co-sureties, 1133
 - of surety by payment by the principal, 1134
 - by death of the principal, 1136

Release—Continued.

of shareholders in joint-stock companies by transfer or forfeiture of shares,
 1326, 1327, 1328

Remittances by post,

operating as a payment, 330

Renewed bills,

acceptance of, suspending the remedy for a debt, 334

Rent,

limitation of suit for, 402, 403

liability of executors upon covenant to pay, 448

covenant to pay, 692, 698

extinguishment and suspension of, by eviction, 700

deduction of ground rent, rates, and taxes, 702, 703

distress for, 704

power of distress extinguished by assignment of the reversion, 705

apportionment of, 706

forfeiture for breach of covenant to pay, 721

See LANDLORD AND TENANT.

Rent-charges,

assignment of, 430

how created, 1048

registration of, 1049

power of distress for, 1050

extinguishment of, 1051

Renunciation,

of a contract, 360

of claim on a bill of exchange or promissory note, 364

See RELEASE.

Repair,

liability of the assignees of the lessee, 432

liability of executors upon covenants to, 449

covenants to, between landlord and tenant, 710-714

See COVENANTS RUNNING WITH THE LAND.

damages recoverable for breach of contract to repair, 767

destruction of buildings by fire or tempest, 767

Repairs,

hypothecation of a vessel for, 71

authentication of contract to make, in the case of realty, 203

bailment of materials for, 879

Representations,

by agents, 65, 66, 67

injunction to compel parties to abide by, 505

amounting to a warranty, 621, 622

inducing a marriage, enforcement of, 1360

See MISREPRESENTATION—WARRANTY.

Repudiation,

of the contract of an agent by the principal, 77

by one party amounting to dispensation of performance by the other, 360

See AVOIDANCE.

Repugnant limitations,

of liability, 225

See LIMITATION OF LIABILITY.

Reputed marriage,

liabilities resulting from, 187

Reputed ownership,

sale of bankrupt's property, 475

of chattels and *choses in action* avoiding a mortgage, 1074

not affected by the registration of a bill of sale, 1074, 1075

of stock and shares avoiding a mortgage, 1109

Request. *See* CONSIDERATION.**Re-sale,**

by a vendor of realty in case of non-performance by the purchaser, 528,
530

specific performance in cases of, 530

vendor's power of re-sale of chattels, 593

Rescission of contracts,

by mutual agreement, 359

by one party on refusal of the other to fulfill the contract, 360

under powers of revocation and defeasance, 361

See AVOIDANCE—RELEASE.

Reservation,

of privileges and easements on demise or sale of lands, 653

Reserve of remedies,

in a release of one of several joint contractors, 365

of a principal debtor, 1130, 1132

Restitution,

of stolen goods, 546

of tenants improperly ejected by order of justices, 752

Restraint of marriage,

contracts in, 255, 1348

Restraint of trade,

contracts in, 270

reasonableness of the restriction, 272

Restrictive indorsement,

of bills and notes, 1241

Retiring of bills, 1265**Retiring partners,**

liabilities of, 109-110

dormant partners retiring, 111

Return,

of things sold on the discovery of latent defects and fraud, 632-645

sale or return, 634

See SALE OF CHATTELS.

Reversion,

assignment of, extinguishing the right to distrain for rent in arrear at the
time of assignment, 705

covenants real annexed to, 433

Reversioner,

covenants between lessee and, 439

Revocation,

of gratuitous promises, 17, 18, 20

of authority of agents, 62, 910

of publication of, 62

of contracts, power of, 361

See COUNTERMAND.

of licenses of pleasure and profit, 652, 671

of license to distrain and sell, 1095

Reward,

promises of, for the conviction of a felon, 9

for the recovery of lost property, 847

Risk,

of loss, transfer of, on sale of land, 512

on sale of chattels, 565

Robbery,

loss by in the case of letting for hire, 787

gratuitous loans, 794

gratuitous deposits, 804

gratuitous commissions, 842

common carriers, 987

marine insurance, 1168

Salaries,

of public officers, 144

of officers of friendly societies, 152

Sale,

contract of, 507

distinction between, and exchange, 507

distinction between, and a contract for the letting and hiring of work,
567, 844

implied contract of, 1403

See SALE OF CHATTELS—SALE OF LANDS

Sale by auction. *See* AUCTION.

Sale of goods and chattels,

to married women, 173

specific performance of contract for, 497, 502

contracts for, 207, 543

title to goods and chattels, 543

in market overt, 545

of stolen horses, &c., 546

right of restitution, 546

out of market overt, 547

by factors and agents, 548

authentication of, 207; 549

requisites of the written memorandum of, 213, 519

brokers' bought and sold notes, 551

liability of the broker, 552

Sale of Goods and Chattels—Continued.

- signature of the memorandum, 214, 552
- signature by agents, 214, 553
- acceptance and receipt of things sold, 207, 554
 - receipt for inspection and approval, 555
 - when goods have been purchased by a bailee, 556
 - delivery at a named wharf, 557
 - constructive acceptance, 558
 - constructive receipt and extinction of the right of lien, 559
 - of bills of lading, delivery orders, and dock warrants, 560
 - by carriers, forwarding agents, and agents for custody, 561
 - part acceptance and actual receipt, 562
- earnest and part payment, 564
- transfer of the right of property in the thing sold, 565
 - imperfect sales of unascertained chattels, 566
 - contracts for sale and manufacture, 567
 - unascertained price, 568
 - perfect sales transferring the ownership and risk before delivery
 - 569
 - selection of chattels by the vendor, and delivery to a carrier
 - on behalf of the purchaser, 570, 571
 - delivery under a bill of lading, 572
 - sale of undivided shares, 573
- conditional sales, 574, 633
- implied promises resulting from executory contracts, 575
 - sale of particular classes of goods, 576
 - implied undertaking by the vendor to furnish the article agreed to be sold, 576
- interpretation of the contract in connection with custom and usage of trade, 577
- time of performance, 578
 - enlargement of time of performance, 579
- non-delivery of goods sold, 580
- rejection and non-acceptance, 581
- non-payment of price, 582
- goods bargained and sold, 582
- goods sold and delivered, 583
 - sale of goods on credit, 584
 - actual and constructive delivery of goods, 585
 - proof of delivery, 586
 - delivery to carriers, 587
- damages for non-performance, 588
 - non-performance by purchaser, 588
 - non-performance by vendor, 589
- specific performance, 590
- abatement of contract price, 591
- reduction of damages for not paying for goods delivered, 591
- lien of the vendor for the price, 592
- re-sale by the vendor, 593

Sale of Goods and Chattels—Continued.

- insolvency of the purchaser, 494
 - avoidance of sale, 494, 632-645
 - countermand of delivery orders, 595
 - countermand in the case of shares and undivided quantities sold as such, 596
 - intervention of the rights of sub-purchasers, 597, 603
 - stoppage *in transitu*, 598
 - in the hands of carriers and forwarding agents, 598
 - in the hands of the purchasers' agent for custody, 599
 - conversion of a carrier, &c., into the purchaser's agent for custody, 600
 - stoppage of part of goods sold, 601
 - notice of stoppage *in transitu*, 602
 - transfer by bill of lading, 604
 - re-sale by vendor after stoppage *in transitu*, 605
- of goods to one of several partners, 606
 - dealings by one partner in fraud of the firm, 606
 - parties secretly interested in the disposition of goods purchased by one of them, 607
 - sub-purchasers of separate shares, 608
- to registered joint-stock companies, 69
- avoidance of sale, 610, 632-645
- warranty of title by vendor, 611, 612
 - implied warranties, 615, 616-622
 - sale by sheriffs, agents, trustees, &c., 614
 - sale of such interest as vendor possesses, 615
- sale by sample, 622
- warranty of trade marks, 623
- warranty as to quantity or country, 624
 - representations amounting to a warranty, 625
 - not amounting to a warranty, 626
 - of matters of opinion and belief, 627
- warranty on sales of horses, 628
- proof of warranties, 629
- construction of warranties, 630
- warranties by agents, 631
- effect of breach of warranty by vendor, 632
- conditional and defeasible sales, 633
 - sale or return, 634
 - fraudulent misrepresentations, 636
 - redhibitory defects enabling a purchaser to annul a contract of sale and recover the price, 635
 - fraudulent concealment of things material to be known to a purchaser, 638
 - sales with all faults, 629
- when the purchaser disables himself from avoiding the contract, 640
- when a vendor is prevented from avoiding a contract of sale induced by the fraud of a purchaser, 641

Sale of Goods and Chattels—Continued.

- determination of the election to avoid a contract, 642
- sales rendered nugatory from want of title, 643
 - recovery of purchase money, 643
- void sales of things not in existence, 644
- effect of avoiding the contract, 645
- damages recoverable, 588, 589, 632-645
 - See* DAMAGES.
- for breach of warranty, 646
 - re-sale with a warranty, 647
- special damages, 647
 - cost of legal proceedings, 647
- sale of ships, 648, 649
 - See* SHIPS.
- sale of fixtures, 650
 - See* FIXTURES.

bill of sale. *See* BILL OF SALE.

Sale of incorporeal hereditaments,

See INCORPOREAL HEREDITAMENTS.

Sales illegal, 651, 315

See ILLEGAL CONTRACTS.

Sale of lands and tenements,

- to infants, 160
- executory contracts for, 200
 - authentication of, 200
 - requisites of the memorandum, 213
 - signature of, 214, 509
 - by agents, 215
- computation of time, 237
- release of purchaser by bankruptcy, 397
- sales by auction, 510
 - without reserve, 510
 - puffers, 510
 - particulars and conditions of, 510
 - See* CONDITIONS OF SALE.
- enforcement of oral bargains, 511
- transfer of property, and risk, 512
- production and proof of title, 513
 - title to realty, 514
 - period for which the title ought to be shown, 515
 - title to leaseholds, 516
 - waiver of proof of, and of objections to title, 517
 - production of title-deed, 518
 - loss of title-deeds, 519
- effect of misdescriptions, 520
- alterations in the condition of the property, 521
- time and mode of performance, 522
 - enlargement of time of performance, 523
- non-performance by vendor, 524

Sale of Lands and Tenements—Continued.

- recovery of deposit, 524
- non-performance by purchaser, 525
 - forfeiture of deposit, 525
 - deposits in the hands of auctioneers, &c., 526
- rights of the vendor, 527
- re-sale by vendor, 528, 530
- damages for breach of contract, 528, 529
- specific performance of contract for, 497, 530
- payment of purchase money into court, 531
- invalid sales, 533
- failure of sale for want of title, 533
 - eviction of purchaser, 533
- assignment of contract to purchase lands, 532
- qualified covenants for title, 534
- breach of covenants for title, 535
- non-payment of purchase money, 536
- sale of pretended titles, 537
- avoidance of sales, 538
 - fraudulent concealment and misrepresentation, 538
- sale with all faults, 539
- voluntary conveyances, 540
- fraudulent conveyances, 541
 - fictitious votes, &c., 541
- conveyances constituting an act of bankruptcy, 542
- reservation of easements upon, 653
- lien for unpaid purchase money, 1046

Settlement of accounts,

- amounting to constructive payments, 418, 419
- between partners, 1305
- See* PAYMENT—ACCOUNT STATED.

Settlements,

- promises of, 1361
- before marriage, 1363
- by infants, 1365
- of after-acquired property, 1366
- post-nuptial, 1367
- fraudulent, 1367, 1370
 - in fraud of an intended husband, 1370
- contracts in fraud of, 1370
- effects of adultery on, 1371
- costs of, 1372

Sale of offices,

- illegality of, 266
- See* ILLEGAL CONTRACTS.

Sale of pensions,

- illegality of, 267

Sale of shares or stock,

- authentication of contracts for, 208

Sale of Shares or Stock—Continued.

- specific performance of, 497
- in joint-stock companies, 661

Sale with all faults,

- of land, 539
- of chattels, 639

Salvage Services,

- payment of, 848

Sample,

- sale by, 622

Satisfaction. *See* ACCORD AND SATISFACTION.**Scip,**

- sale of, 660
- executory contracts for, 661
- See* SHARES.

Scipholders,

- rights of, 666

Sealing,

- of deeds, 26

Seamen's Wages,

- recovery of, 902
- effect of promise to pay for increased exertions, 4

Sea-risks,

- covered by the policy of insurance, 1163

Sea-worthiness,

- in insurance cases, 1151

Secretary,

- of a railway company, contracts with, 119
- of joint-stock companies. *See* PUBLIC OFFICERS.

Securities,

- for money won at play, 279

Seduction,

- contracts founded on, 252
- See* ILLEGAL CONTRACTS.

Separation,

- of husband and wife, 178, 181-183, 254, 1384, 1388
- by reason of adultery, 178
- judicial, effect of, 183
- of husband and wife, illegality of contract providing for, 254
- wife's right of action in her own name after, 1386

Separation Deeds, 1384

- subsequent reconciliation, 1385

Servant,

- purchase by, 68
- payment to, 331
- See* MASTER AND SERVANT.

Service at will, 887

- See* HIRING AND SERVICE.

Services. *See* WORK AND SERVICES.

in connection with transfer of land, 204

contracts for prohibited, 292

Sewers Rate,

deduction of, from rent, 703

Sharebroker, 916

See AGENT—BROKERS.

Shareholders,

in joint-stock companies, 121, 122, 609

in partnerships under the management of trustees or directors, 130

in partnerships authorized to sue and be sued in the name of a pul
officer, 132

in mining companies, liabilities of, 134

proof of parties being, 135

in banking co-partnerships, 137

limitation of liability of, 1325

liabilities of outgoing and incoming shareholders, 125, 1315, 1328

See CONTRIBUTORIES.

release from liability by transfer and forfeiture, 1326, 1327, 1328

feme covert, 1329

death of, 1329

bankruptcy of, 1329

contracts between shareholders in projected undertakings and the pro
lional committee, 1342

See LIMITATION OF LIABILITY.

Shares,

purchase of shares by infants, 160

authentication of contracts for the sale of, 208

specific performance, 497, 663, 674

injunction to restrain directors, 503

sale of, 659

title to, 660

executory contracts for the sale of, 661

agreements for transfer of, 662

mode of performance, 663

time of performance, 664

implied undertakings and indemnities, 665

payment of calls, 665, 669

scripholders, rights of, 666

transfer deeds, 667, 668

registration of transfers, 669

compulsory registration, 670

rectification of register, 671

registration of forged transfers, 672

transfer of stock in the public funds, 673

mortgages of, 1108

void by reason of reputed ownership, 1109

lien upon, 1110

equitable mortgage of, 1110

Shares—Continued.

transfer of, releasing the shareholder from liability, 1326, 1328

forfeiture of, releasing the shareholder from liability, 1327

allotment of, in projected undertakings, 1343

See TRANSFER OF SHARES.

Shares and undivided quantities,

of goods and chattels, sale of, 573

Sherriffs,

sale by, 614

officers, liabilities of, 618

Ship-brokers,

right of, to commission, 927

See AGENT.

Shipbuilding,

when the general property in the unfinished ship vests in the employer,
869

Shipmaster,

authority of, to hypothecate the vessel for repairs and supplies, 71

to pledge the credit of shipowners, 71

to sell the vessel, 648

to sign bills of lading, 951

limitation of the authority of, 72

liabilities of, 84

lien of, 935

Shipowners,

liability of, upon contracts made by shipmasters, 71

rights and liabilities of. upon charter-parties, 938-974

under bill of lading, 951

limitation of the responsibility of, 959

delivery of goods by, 961

lien of, for freight, 967

See CARRIERS—CHARTER-PARTY.

Ships,

mortgage of, 71, 1098

hypothecation of, 71, 1100

repairs to, 71, 72

title to, 648

shares in, 648

sale and transfer of, 648, 649

letting and hiring of, 839

See CHARTER-PARTY—CARRIER—WORK AND SERVICES.

Signature,

of deed, 25

of ratifications by infants, 162

what is sufficient within the Statute of Frauds, 214

by agents, 215

See FRAUDS, STATUTE OF.

of acknowledgments within the Statute of Limitations, 411

Simoniackal contracts, 268

Simple contract, 2

See CONSIDERATION—CONTRACT.

parties entitled to enforce, 32

parties liable upon, 38

See PARTIES TO CONTRACTS.

limitation of suits for, 403

acknowledgment of, extending the period of limitation for 409

assignment of by death, 440, 446

Skilled workmen,

want of skill in the borrower of a chattel, 793

liabilities of, 874

dismissal of, for incompetency, 889

Small tenements,

recovery of possession of, 752

Smuggling, 289**Solicitor,**

uncertificated, 295

liability of firm for money received by one partner, 797

liability upon a promise without reward to invest money, 790

general liabilities of, 876, 917

action against for negligence, 877

Special damages,

when recoverable, 486, 488

costs of legal proceedings, when recoverable, 489, 647

for breach of warranty, 647

Specialty debts,

limitation of actions for, 403

what are, 404

acknowledgments, extending the period of limitation for, 409

Specification,

in building contracts, performance of, 864

deviations, extras, 870

Specific delivery of chattels,

orders for, 502, 590

Specific performance,

of contracts, 497–502

of sale of lands, 497

of sale of goods, 497

of sale of chattels of a specific character, 497, 502

of sale of stocks and shares, 497, 662, 674

conditional contracts, 497

mutual relief to both parties, 497

accessory agreements, 497

inconvenience to the public, 504

trustee promising to leave money to *cestui que trust*, 497

sale of goodwill of business, &c., 497

sale of patent, 497

contract of fire insurance, 497

agreements for annuities, 497

Specific performance—Continued.

- for partition, 497
- to grant a lease, 497
- to renew a lease, 497
- to build buildings where not yet planned, 497
 - to execute a mortgage, 497
- contracts of partnership, 497
- articles of apprenticeship, 497
- agreements to refer, 497
 - for purchase of a lease, 497
- charter-parties, 497, 503
- agreements in consideration of marriage, 497
- promises of portions and settlements, 497
- deeds of separation, 497
- of oral contracts, 498
 - for the sale of realty, 498
- contracts under seal without consideration, 498
- contracts between incompetent parties, 499
- illegal or immoral contracts, 499
- fraud, 499
- mistake, 499
- proviso for penalties or liquidated damages, 499, 502
- of uncompleted contract, 499
- auctioneers, 499
- agents, 499
- performance *sub modo*, 500
- of statements and representations forming the foundation of a contract
510
- subsequent and oral agreement, 501
- orders for the specific delivery of chattels wrongfully detained, 502

See INJUNCTIONS.

Spirituous liquors,

- sale of, 285

Sporting,

- rights of, agreement for, 652

Stakeholders,

- recovery of money in the hands of, 304, 811
 - deposits by two persons, jointly, 808
 - liabilities of, 811
 - power of. to compel adverse claimants to interplead, 812
- See* DEPOSIT—BAILMENT WITHOUT REWARD.

Stakes,

- in the hands of stakeholders, 304, 811
- rival claimants, 811, 812

Statute merchant and staple, 1055**Statute of frauds. See FRAUDS.****Statutes of limitations. See LIMITATION.****Statutes,**

- contracts made illegal by, 265

Stock,

transfer of, 673

See SHARES.

damages recoverable in actions for not replacing, 799

mortgage of, 1108

Stockbrokers,

authority of, 73

rights and liabilities of, 916

See BROKERS—AGENTS.

Stock exchange rules, 73, 661, 663, 664, 916

Stock in Trade,

mortgage of, constituting an act of bankruptcy, 1073

Stock-jobbing contracts, 275

Stolen property,

purchase of, 546

purchase of stolen horses, 546

right of restitution, 546

Stolen bank note,

payment with, 337

Stoppage in transitu, 593-605

in the hands of forwarding agents, 598

goods in the hands of the purchaser's agents for custody, 599

conversion of the carrier into an agent for custody on behalf of the

purchaser, 600

stoppage of part of goods sold, 601

notice of stoppage *in transitu*, 602

intervention of the rights of sub-purchasers, 603

extinguishment of the right of stoppage, 603

indorsement of bills of lading, 604

vendor's power of resale, 605

Stowage,

letting and hiring of, 776

Stranding,

in marine insurance, 1193

Strangers,

to a contract, 33

receipt of money by agents to be paid to, 89, 1413

payment by, 338

payment by or to, barring the statute of limitations, 422

Straw,

sale of, off the farm, 754

Sub-agents,

receipt of money by, 922

Sub-purchase,

nature and effect of, 597, 603

distinction between sub-purchasers and joint-contractors, 607, 1296

Subscribers,

to clubs, 142

to projected partnerships, 1342

Subscribers—Continued.

payment of subscriptions and deposits, 1344

See SHAREHOLDERS—DEPOSIT.

Substitution. *See* NOVATION AND SUBSTITUTION—ACCORD AND SATISFACTION.**Sufferance,**

tenancy by, 687

Sunday sales,

and trading, 291

Suretyship,

contract of, 1111-1143

See GUARANTEE

Surgeon,

disabilities of, when unregistered, 293

false assumption of the character of, 293

right of, to remuneration, 876

negligence and want of skill of, 877

Surrender of leases,

how made and authenticated, 723, 219

deeds and agreements of, 723

by act and operation of law, 724

acceptance of a new lease or of a new tenant, 725

by joint tenant, 726

See LANDLORD.

non-extinguishment of derivative estates, 727

effect on existing breaches of covenant, 728

Surveyors,

contracts with, 146

approval of work by, 859

relief against corrupt decisions of, 860

See PARISH OFFICERS.

Survivorship,

as between husband and wife, 169, 186, 1389-1393

amongst executors and administrators, 459

amongst joint contractors, 465

amongst partners, 1313

Tacking,

of incumbrances, 1036, 1038

See MORTGAGE.

Taskwork,

letting and hiring of, 844

executory contracts for, 846

implied promise of remuneration for, 846

honorary services, 851

time for performance, 854

See TIME OF PERFORMANCE.

entire performance a condition precedent to payment for, 855

divisible and apportionable work, 856

Taskwork—Continued.

- work to be approved before payment, 858
- defective work accepted by the employer, 863
 - See* CONDITIONS PRECEDENT—PART PERFORMANCE.
- abatement of contract price, 865
- destruction of materials and of the work before payment, 869
- deviations, extras, 870
- prevention of completion of work by the employer, 871, 881
- useless, defective, and unskillful work, 875
- safe keeping and re-delivery of chattels and materials intrusted to workmen, 879, 880
 - See* WORK AND SERVICES—BUILDING CONTRACTS—MASTER AND SERVANT.

Taxes,

- deduction of, from rent, 703

Technical terms,

- use of, in contracts, 245, 246

Telegram,

- acceptance of offers by, 22

Telegraph clerks,

- authority of, 70

Telegrams,

- contracts for transmission of, 1015
- limitation of liability of telegraph company, 1015

Tenancy,

- at will, 686
- by sufferance, 687
 - See* LANDLORD AND TENANT.

Tenant,

- duty of, to preserve timber trees, 712
- landmarks and boundaries, 713
 - See* LANDLORD AND TENANT.

Tenant right, 753

Tenants in common,

- joinder of, as plaintiffs, 33
- right of, on covenants running with the land, 438
- use and occupation by one, of land holden in common, 709
- of chattels, not partners, 1297
- money had and received by, 1410

Tender,

- of performance of conditions and contracts, 325
- of money, 355
 - what amounts to a valid tender, 355
 - offers of payment not amounting to, 356
 - tenders clogged with terms, conditions, and reservations, 357

Terms of art,

- interpretation of, 246

Terms of years. *See* LANDLORD—SURRENDER.

Theft,

- of things let to hire, 787
- of things lent, 794
- of deposits, 804
- in cases of gratuitous commission, 842
- from carriers by water, 954, 1168
- by servants of common carriers, 987

Third party,

- services to, good consideration, 9

Tillages, 753**Timber trees,**

- sale of, 206
- preservation of, by tenants, 711, 712

Time,

- computation of, in sales of realty, 237
- covenants not to sue for a limited time, 371

Time of performance,

- of contracts, 320
 - for the sale of lands, 522, 237
 - for the sale of goods and chattels, 578
 - for the sale of shares, 664
 - for works and services, 866, 867, 854
- of conditions precedent in charter-parties, 945
 - waiver of, 947
- of promises to marry, 1353

Tithe-rent charge,

- non-payment of, by outgoing tenant, 758

Title,

- to realty, production and proof of, 513
 - abstract of, 513, 514
 - period for which the title ought to be shown, 515
- to leaseholds, 516
- waiver of objection to, 517
- loss of title deeds, 519
- want of, in the vendor, 533
 - recovery of the purchase money, 533
- covenants for, 535
 - damages for breach of, 535
- sale of pretended, 537
- to chattels, 541
 - purchases in market overt, 545
- express and implied warranties of title to chattels, 611-622
 - what amounts to an affirmation of, 612
 - sale by a party as owner, 613
 - notice of a special or qualified title in the vendor, 614
 - sale of such a title or interest as the vendor himself possesses, 625
- eviction of purchaser from want of, 643
 - purchase-money, when recoverable, 643
- damages for breach of covenants for quiet enjoyment, 765

Title—*Continued.*

warranty of, by pledgors, 1083

Title-deeds,

production of, 513

loss of, 519

Tolls,

demise of, 689

Total loss,

and abandonment, 1182

See MARINE INSURANCE.

Trade,

contracts in restraint of, 270, 272

Trades unions, 152, 271

Trade acceptations,

interpretation of, 246

Trade marks,

warranty of, 623

Trading companies,

under the management of trustees or directors, 137, 142, 1338, 1347

See BANKING CO-PARTNERSHIP—JOINT STOCK COMPANY.

Trading corporations. *See* CORPORATION.

Transfer,

of property by way of accord and satisfaction, 381

of possession, 384

fraudulent transfer, 385

act of bankruptcy, 386

of contracts by assignment, 426

See ASSIGNMENT.

of covenants. *See* COVENANTS RUNNING WITH THE LAND.

transfer by death, 440

See HEIR AT LAW—EXECUTORS AND ADMINISTRATORS.

transfer by marriage

See HUSBAND.

transfer by bankruptcy

See BANKRUPTCY.

Transfer of shares,

agreements for, 662

mode of performance, 663

time of performance, 664

implied undertakings and indemnities annexed to contracts for the

sale of shares, 665

payment of calls, 665, 669

rights of scripholders, 666

transfer deeds, 667

of shares in registered joint-stock companies, 668

register of transfers, 669

compulsory registration, 670

rectification of the register, 671

registration of forged transfers, 672

Transfer of Shares—Continued.

- transfer of stock in the public funds, 673
- specific performance of contracts for the purchase and sale of stock and shares, 674
- release from liability by, 1326
 - liabilities of outgoing and incoming shareholders, 1328
- by marriage, death, and bankruptcy, 1329

Transfer deed,

- requisites of, 667, 668
- registration of, 669, 670
- See* TRANSFER.

Travellers,

- right of, to commission, 929

Treasurer,

- of joint-stock companies, contracts with. *See* PUBLIC OFFICERS.

Truck system,

- illegality of, 297

Trust and confidence,

- forming a good consideration for a promise, 15

Trust deeds,

- founded in fraud, 380

Trust estates,

- of bankrupt, 472

Trust money,

- deposit of, with bankers, 823
- loss of, 825

Trust services, 849

- by one of several parties, 94

Trustees,

- parties to contracts, 35
- contracts by, on behalf of the *cestui que trust*, 36
- of public works, contracts with, 143
- disabilities of, 313
- payment to, 348
- specific performance decreed against, 497
- sales by, 614
- services by, 849
- bills and notes by, 1286
- statement of accounts by, 1416

See DIRECTORS.

Trustees of Roads,

- contracts with, 143

See COMMISSIONERS.

Trustees in bankruptcy. *See* BANKRUPTCY.**Under lease,**

- from year to year by a lessee from year to year, 683

Under lessee,

- payment of ground rent by, 702
- holding over by, 743

Undertaking. *See* GUARANTEE.

Underwriters,

of policies, liabilities of, 1197

See MARINE INSURANCE.

Undisclosed principals. *See* AGENTS.

Unilateral promises,

and undertakings, 17

Unreasonable conditions,

in railway tickets, 1000

Unsoundness,

in horses, 628

Undiscovered breaches,

of contract, time when limitation begins to run, 408

Unwholesome food,

sale of, 621

Usage. *See* CUSTOM AND USAGE.

Use and occupation,

actions for, 707

constructive, 708

by under-tenant or under-lessee, 708

conversion of a tortious holding into a permissive occupation, 708

by one of several joint-tenants or tenants in common, 709

by corporations, 118, 708

damages in actions for, 764

See LANDLORD AND TENANT.

Usury laws,

repeal of, 281

Valuation and adjustment,

of losses under policies of insurance, 1195

See MARINE INSURANCE.

effect of absence of valuation in fraudulent transfer, 382

Valuers,

liability of for negligence or want of skill, 876

Vendors. *See* SALE OF LANDS—SALE OF CHATTELS.

implied warranties by. *See* WARRANTY.

misrepresentation by, on sale of chattels, 636, 637

fraudulent concealment by, 638

Vessels. *See* SHIPS—SHIPMASTER—SHIPOWNERS—MARINE INSURANCE—
CHARTER-PARTY.

Vestrymen,

contracts with, 146

Void contracts, 251

See ILLEGAL CONTRACTS.

by railway companies, 1330, 1333

Void limitation of liability, 225

by common carriers, 993

Void marriages, 1376

Void sales,

of realty, 533-542

See SALE OF LANDS.

of chattels, 632-645

See SALE OF CHATTELS.

recovery of purchase-money of realty, 538

recovery of purchase-money of chattels, 632-645

See FRAUD—RECOVERY OF MONEY.

Voluntary conveyance,

defrauding creditors, 264

defrauding purchasers, 540

creating colorable qualifications, 540

Votes,

conveyance for creating fictitious, 541

Wagering policies,

of marine assurance, 1148

of life assurance, 1222

Wagers,

nullity of, 276

Wages,

payment of, 897, 898

presumption of payment of, 899

See PAYMENT.

summary remedy for recovery of, 900

See HIRING AND SERVICE—WORK AND SERVICE.

Waiver,

of performance of conditions precedent, 233

of demand of performance of contracts, 323

of performance of contracts, release by, 359

of proof of title to realty, 517

of forfeiture of a lease 720

of notice to quit, 742

of the time limited for performance of contracts of carriage, 947

Warehousemen,

contracts with, 35

acceptance and receipt by, binding a contract of sale, 561

stoppage *in transitu* of goods in the hands of, 598

safe keeping of goods intrusted to, to be kept, 801

insurance by, against fire, 1215

transfer by dock-warrant of goods in the hands of, 1292

Warning,

and notice to leave, 892

See HIRING AND SERVICE.

Warrant of attorney,

to enter up judgment, 1053

Warranty,

implied promise that an article furnished fairly answers the description given of it, 576

Warranty—Continued.

of title, 611

implied warranty by vendor that he is not aware of his want of title,
611

implied warranty of title by vendors selling as owners, 613

by persons selling as sheriffs, agents, trustees, &c., 614

caveat emptor, 614, 616

sale by vendor of such title as he actually possesses, 615

warranty on sales, 616-647

implied warranty when nothing is said respecting quantity or quality
66

when the vendor is told that the thing ordered is required for a
specific purpose, 618

of merchantable quality, 617

by vendors who manufacture and sell an article to be used for a
specified purpose, 619, 620

on sales of provisions, 621

on sale by sample, 622

as to genuineness of articles with trade-marks, 623

of description as to quantity or country, 624

representations amounting to a warranty, 625

representations not amounting to a warranty, 66, 626

representations of matters of opinion and belief, 627

on sales of horses, 628

proof of warranties, 629

construction of express warranties, 630

warranty by agents, 65, 66, 631

effect of a breach of warranty by the vendor, 632

conditional and defeasible sales, 633

sale or return, 634

sales rendered voidable on the ground of fraudulent misrep-
sentation, 636, 637

redhibitory defects, 635

fraudulent concealment, 638

sales with all faults, 639

damages for breach of warranty, 646

re-sale with a warranty, 647

by letters of furnished houses, 771

of authority by agents, 937

by pledgors, 1083

in marine assurance, 1151

See MARINE INSURANCE.

in fire assurance, 1205

See FIRE INSURANCE.

in life assurance, 1223

See LIFE INSURANCE.

Waste,

liability of tenants and lessees for, 711

Watercourse,

sale and grant of right of, 652, 654

See INCORPOREAL HEREDITAMENTS.

Way,

grant of rights of, 652, 654, 655

Waywardens,

prohibited contracts by, 296

Weekly lettings, 685**Weights and measures,**

to be used in buying and selling, 282

Wharfingers. *See* DELIVERY ORDER—WAREHOUSEMEN.**Widow,**

rights of, by survivorship, 169, 469, 1393

liability of, on contracts made before marriage, 1397

after the death of the husband, 469, 1397

See HUSBAND.

Widower,

rights of, by survivorship, 1389, 1390

liabilities of, 1392

See HUSBAND.

Wife,

husband's right of action upon wife's contracts, 168, 467

rights and liabilities of, by survivorship 169, 186, 468

inability of wife to make binding deeds 170

authority of wife to sign writings, 171

inability of, to contract so as to bind herself at common law, 169

loans of money to wife, 172

sale of goods to wife, 173

assent of husband to wife's contracts, 174

giving credit to wife, 175

capacity of, to contract in equity, and incur debts, 175

remedies of creditors, 176

proof of marriage, 177

wife's adultery, 178

desertion by wife, 179, 184

expulsion of wife, 181

necessaries during separation, 182

decree for judicial separation, 183

right of action of in her own name, 183, 1386

order for the protection of the property and earnings of, 184

death of husband, 186

reputed marriages, 187

wife's *choses in action*, 466

liability of the wife upon contracts made by her before marriage, 468

right of the husband to the rents and profits of the wife's lands, 1380

Married Women's Property Act, 1380

gifts from the husband, 1381, 1395

release by marriage, 1383

deeds of separation, 1384

Wife—Continued.

- subsequent reconciliation, . 385
- wife's right of action after separation, 1386
- wife's *choses in action* after decree, 1388
- death of the wife, 1389
- death of the husband, 1393
 - wife's rights by survivorship, 1393-1398
- gifts during marriage, 1395
- paraphernalia*, 1396
- liabilities of the surviving wife, 1397
 - right to an indemnity out of the husband's estate, 1398

Will,

- tenancy at, 686

Winding-up,

- effect of winding-up order, 126
- See* CONTRIBUTORIES—JOINT-STOCK COMPANIES.

Witness,

- expenses of, for attendances in court of justice, 851

Words,

- control figures, 224

Work and services,

- a valid consideration, 8
- contracts for prohibited services, 292
- deposit or simple bailment, 800
 - See* BAILMENT WITHOUT REWARD.
- contracts for, 844
 - taskwork, 844
 - distinction between contracts for work and services and contracts of sale, 845
 - executory and executed contracts for work, 846
 - work and services in preserving a lost chattel, and restoring it to owner, 847
 - salvage services, 848
 - services by trustees, 849
 - promises of presents in return for services, 850
 - honorary and gratuitous services, 851
 - rights and liabilities of employer and workman, 852
 - defeasible contracts for work and services, 853
 - time of performance, 854
 - entire performance of a contract for work, when a condition precedent to payment, 855
 - divisible and apportionable work, 856
- building contracts, 857
 - work to be approved of before payment, 858
 - approval of an architect or surveyor, 859
 - relief against biased or corrupt decisions of architects and surveyors, 860
 - actions for wrongfully withholding the certificate, 861
 - employers taking possession of unfinished work, 862

Work and Services—Continued.

- defective work accepted by the employer, 863
- substantial performance of building contracts, 864
- abatement of the contract price, 865
- non-performance of, by the time specified, 866
 - penalties for non-performance of building contracts by a time specified, 867
- security for the due performance of the contract, 868
- destruction of work before payment, 869
 - loss of materials, and loss of the price of the work, 869
- deviations from building contracts, 870
 - extras, 870
- prevention of performance of, 871, 881
- Liën of workmen and artificers, 872
- liabilities of task-workmen, 873
 - implied obligation to do the work well, 874
 - skilled workmen, 874
 - work rendered useless by the negligence or incompetence of the workmen, 875
- useless and unskillful professional services, 876
 - negligence of solicitors, surgeons, valuers, &c., 877
 - willful selection of unqualified persons, 878
- bailment of materials to be manufactured or repaired, 879
 - re-delivery of such materials, 880
- contracts for performance of work, 881
 - damages recoverable for breach of, 881
 - prevention of performance, 881
- implied promises resulting from, 1401

See MANUFACTURE—HIRING AND SERVICE.

Written promises,

- nugatory, 7

Wrongful dismissal,

- actions for, 895
- damages recoverable for, 897, 907

Year,

- authentication of promises not to be performed within 212
- tenancy from year to, 683
- yearly hirings of domestic servants 884

THE END.

